# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1927

## No. 744

JAMES A. REED, CHARLES L. McNARY, WILLIAM H. KING, ET AL., ETC., PETITIONERS,

vs.

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA; THE PROTHONOTARY OF DELAWARE COUNTY, AND JOHN J. SAILING, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1928.

CERTIORARI GRANTED MARCH 12, 1928.

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IN THE

# District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 4017. March Term, 1927.

JAMES A. REED, CHARLES L. McNARY, WILLIAM H. KING, ROBERT M. LaFOLLETTE, JR., SENATORS, ETC., AND JERRY C. SOUTH, ATTORNEY AND REPRESENTATIVE, ETC., — A. B. Geary. Jerry C. South.

*v.*

COUNTY COMMISSIONERS OF DELAWARE COUNTY; PROTHONOTARY OF DELAWARE COUNTY; JOHN J. SALING, JUSTICE OF THE PEACE OF DELAWARE COUNTY, AND ALL OTHER JUSTICES OF THE PEACE OF DELAWARE COUNTY WHO HAVE CUSTODY OF BALLOT BOXES USED AT GENERAL ELECTION HELD IN DELAWARE COUNTY ON NOVEMBER 2, 1926. — A. J. Williams. H. W. Savidge. J. E. McDonough.

## DOCKET ENTRIES.

| | |
|---|---|
| Mar. 26, 1927. | Petition in re: Investigation by U. S. Senate of General Election held Nov. 2, 1926, at which a Senator for the State of Pennsylvania was elected, filed. |
| " 29, " | Decree directing defendants to answer Petition and fixing date for hearing filed. |
| Apr. 14, 1927. | Answer of County Commissioners and Prothonotary of Delaware County filed. |
| " " " | Answer of J. J. Sailing, Justice of the Peace Delaware County, filed. |

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| Apr. 14, 1927. | Petition of James F. Woodward for leave to intervene as party respondent filed. |
| " 18 " | Motion by H. M. Birney, et al., to Dismiss Bill filed. |
| " " " | Amended Petition filed. |
| " " " | Argued. |
| June 22, 1927. | Order of Court directing that proofs be closed within ten days, filed. |
| July 12, 1927. | Record of proceedings in open Court filed. |
| " " " | Cert. copies of Resolutions (2 covers) filed. |
| " " " | Opinion, Thompson J., dismissing Bill for want of jurisdiction, filed. |
| " 29, " | Final Decree dismissing Petition filed. |
| " " " | Petition for Appeal filed. |
| " " " | Decree allowing appeal filed—Bond in $250. to be entered. |
| " " " | Assignments of Error filed. |
| " " " | Præcipe for transcript of record sur appeal filed. |
| " " " | Petition for Temporary Restraining Order filed. |
| " " " | Decree directing that Restraining Order issue. |
| " " " | Restraining order filed. Cert. copy exit. |
| " 30, " | Bond for Costs in $250 with Michael Francis Doyle, Esq., surety, filed. |
| " " " | Order approving bond for costs filed. |
| " " " | Citation allowed and issued. |
| Aug. 8, 1927. | Certified copy Restraining Order returned with return of Marshal endorsed thereon and filed. |
| " " " | Copy of Notice of Appeal filed. |
| " 10, " | Citation returned: "service accepted" and filed. |

## AMENDED PETITION.

(Filed Apr. 18, 1927.)

I.

On the 26th day of March, 1927, comes James A. Reed, Charles L. McNary, William H. King and Robert M. LaFollette, Jr., constituting a Special Committee of the United States Senate acting under authority of Senate Resolution number 195 and Senate Resolution number 324, 69th Congress; and Jerry C. South, of Washington, District of Columbia, the attorney and duly authorized agent of said Special Committee of the United States Senate, as aforesaid, petitioners herein, and represent and show to the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania as follows:

That said petitioners herein constitute a duly selected and acting Special Committee of the United States Senate appointed as aforesaid under and by authority of Senate Resolution number 195 and 324, 69th Congress, and that Jerry C. South, of Washington, District of Columbia, is by the authority of said committee their attorney in fact and special representative to do and perform all acts necessary to secure all ballot boxes, books and papers and other election paraphernalia used in the election held on November 2, 1926, in the State of Pennsylvania; and that said petitioners herein, as evidence of the authority of the United States Senate delegated to said committee, attach hereto Senate Resolution number 195, marked "Exhibit A" and made a part hereof, and also Senate Resolution number 324, marked "Exhibit B" and made a part hereof; and as evidence of the authority, general powers of representation and attorney of the petitioner, Jerry C. South, there is attached hereto his

credentials of appointment by said Special Committee, marked "Exhibit C" and made a part hereof.

II.

Your petitioners aforesaid, the members of said Special Committee of the United States Senate appointed and acting under authority of said Senate Resolutions number 195 and 324 of the 69th Congress, of which James A. Reed, a Senator from the State of Missouri, is chairman, and said committee, acting under power granted under the Constitution of the United States in Article I, Section 5, to the United States Senate to be the "judge of the qualification and election of its own members," and because of the failure and refusal of David S. Barry, sergeant-at-arms of the United States Senate, to act for and carry out the orders of said committee, it has duly and legally constituted and appointed the petitioner, Jerry C. South, as its representative and attorney, with specific, definite and general powers to act for and in the name of said Special Committee, a copy of which appointment, marked "Exhibit C" it attached hereto and made a part of this petition.

III.

Your petitioners now further represent and show to the Honorable District Court of the United States for the Eastern District of the State of Pennsylvania that pursuant to authority and special instruction to proceed to the County of Delaware in the State of Pennsylvania and to take into possession all ballot boxes used in Delaware County in the General Election holden in the Commonweaith of Pennsylvania on the 2nd day of November, 1926, together with contents of said boxes and also to take into custody all ballots, return sheets, talley sheets, voters' lists, voters' check lists, ballot check lists and registration lists, employed,

used in and appertaining to said election, all the same to securely keep, in the City of Washington, District of Columbia, for the use of the above mentioned Special Committee.

That in pursuance of the authority given to your petitioner, Jerry C. South, attorney and special agent and representative as set forth in "Exhibit C," came to the State of Pennsylvania and called upon the Commissioners of Delaware County at their offices in the court house at Media in said county, and in person presented the original of his commission and orders and gave to the president or chairman thereof, Mr. Harry M. Birney Jr., and to another member of the commission, Mr. Thomas M. Feeley, a copy of said orders herein set out as "Exhibit C" and demanded the delivery of all ballot boxes and their contents, and all other of the election paraphernalia mentioned in said commission and orders, then in their possession or which should under the laws of Pennsylvania be in their possession, and after due time for consultation and deliberation, the said commissioners failed and refused to deliver any part of the books, papers, boxes, ballots and articles demanded.

Your petitioners further represent and show to this Honorable Court that said attorney and special representative called upon Mr. William Ward, Jr., prothonotary of said Delaware County, and presented the original of his commission and orders and left with him a perfect copy thereof, and demanded the delivery of such books, papers and things enumerated in aforesaid instrument, and after waiting a reasonable time, he, the said prothonotary, also failed and refused to deliver all or any part of the evidence demanded.

Your petitioners would further represent to the Court that said attorney and special agent called upon Mr. John J. Saling, a justice of the peace for Upper Darby Township of said Delaware County, Pennsyl-

vania, and likewise presented to him the original of his commission and orders, and left with him a copy thereof, and then demanded the delivery of twenty-two ballot boxes and their contents of the General Election held in said Delaware County and State, but the said justice of the peace failed and peremptorily refused to deliver any of the said ballot boxes so demanded.

Wherefore, your petitioners pray that this Honorable Court issue process directed to each of the above mentioned persons to appear in this court and show cause, if any they have, why this Court should not by proper orders and decree to effect the delivery of the evidence demanded at their hands, to be by the attorney in fact and special representative ultimately delivered to and for use of this Special Committee of the United States Senate, at the City of Washington, District of Columbia.

Premises considered, your petitioners pray that when petitioners shall be able to discover the names and identity of the several county commissioners, prothonotaries, justices of the peace and aldermen who have in their possession any part of the election paraphernalia mentioned in the commission of said attorney and special representative of said committee herein set out in "Exhibit C" attached, that the Court shall order the names and official titles inserted in and to such final orders as the Court shall deem fit and proper to make, premises considered, and for all proper orders and for general relief.

Respectfully submitted,

JERRY C. SOUTH,

*Attorney in fact and Representative of the Special Committee of the United States Senate, acting under Senate Resolution 195 and Senate Resolution 324 of the 69th Congress.*

**"EXHIBIT A"**
**To Plaintiffs' Petition.**

69TH CONGRESS
1ST SESSION

S. RES. 195

IN THE SENATE OF THE UNITED STATES

APRIL 5 (calendar day, APRIL 8), 1926

Mr. REED of Missouri submitted the following resolution; which was ordered to lie on the table

MAY 17 (calendar day, MAY 19), 1926
Considered and agreed to

RESOLUTION

*Resolved*, That a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive Republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or associa-

tion, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require by subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties pro-

vided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

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(Endorsed: 69th Congress 1st Session S. Res. 195 Resolution Authorizing the President of the Senate to appoint a special select committee to make investigation into the means used to influence the nomination of any person as a candidate for membership of the United States Senate. By Mr. Reed of Missouri. April 5 (calendar day, April 8), 1926. Ordered to lie on the table. May 17 (calendar day, May 19), 1926 Considered and agreed to.)

**"EXHIBIT B"**
**To Plaintiffs' Petition.**

69TH CONGRESS
2D SESSION

S. RES. 324

IN THE SENATE OF THE UNITED STATES

JANUARY 10, 1927

Mr. ROBINSON of Arkansas submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate

JANUARY 11, 1927

Reported by Mr. KEYES, without amendment; considered, amended, and agreed to; preamble agreed to

RESOLUTION

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2d day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator from the State of Pennsylvania, and that unless preserved for the use of the Senate certain evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation

pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it in the State of Pennsylvania: Therefore be it

*Resolved*, That the special committee of five constituted under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, in addition to and not in detraction from the powers conferred in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony.

*Resolved further*, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee or any subcommittee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

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(Endorsed: 69th Congress, 2d Session. S. Res. 324. Resolution Authorizing the Select Committee on Investigation of Expenditures in Senatorial Primaries and Elections to take and preserve evidence in connection with the election of a Senator from Pennsylvania on November 2, 1926. By Mr. Robinson of Arkansas. January 10, 1927, Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. January 11, 1927, Reported without amendment; considered, amended and agreed to; preamble agreed to.)

**"EXHIBIT C"**
**To Plaintiffs' Petition.**

March 19, 1927.

Hon. Jerry South,
Washington, D. C.

Dear Mr. South:

At the direction of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections, and pursuant to the authority in it vested by Senate Resolutions numbered 195 and 324 of the 69th Congress, I hereby authorize and instruct you to proceed to Delaware, Lackawanna, Luzerne and Schuylkill Counties, Pennsylvania, in each of said Counties to act as the authorized representative of and attorney for the Committee, to take into your possession and securely seal all ballot boxes used in each of said Counties in the general election holden in the Commonwealth of Pennsylvania on the 2nd day of November, 1926, together with the contents of said boxes; and also to take into your possession all ballots, return sheets, tally sheets, voter's lists, voter's check lists, ballot check lists and registration lists employed, used or appertaining to the said election; and all of the same to securely keep in some convenient place in the City of Washington, District of Columbia, for the use of the Special Committee of the United States Senate appointed to investigate said election.

You will carefully and securely seal all such ballot boxes and will examine the same, carefully note their condition at the time they come into your possession, and keep an accurate record thereof.

This instrument will constitute the evidence of your authority, and a copy thereof you will deliver to

the officers and custodians of such ballot boxes and instruments of writing.

DONE by authority of the United States Senate under Senate Resolutions Number 195 and Number 324, 69th Congress.

The Special Committee appointed pursuant to said Resolutions.

By /s/ JAS. A. REED
James A. Reed
*Chairman.*

Witness:

A true copy

/s/ H. YATES
*Clerk.*

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

Jerry C. South, attorney in fact and representative of the above Special Committee of the United States Senate acting under and pursuant to Senate Resolutions number 195 and 324 of the 69th Congress, being first duly sworn deposeth and sayeth that the facts set forth in the foregoing petition are just and true, as he verily believes.

Subscribed and sworn to before me this 18th day of April, 1927. } JERRY C. SOUTH.

THEODORE L. COBAUGH,
*Deputy Clerk, Dist. Court.*
*U. S., Eastern Dist. of Penna.*

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**SUMMONS.**

(Filed March 29, 1927.)

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Before THOMPSON, *J.*

AND NOW, to wit, this twenty-ninth day of March, A. D. 1927, on motion of A. B. Geary, Esq., and Jerry C. South, Esq., attorneys for petitioners, it is

ORDERED, that each of said respondents, *viz.*, Harry M. Birney Jr., Thomas M. Feeley, Commissioners of Delaware County, William Ward, Jr., Prothonotary of Delaware County, and John J. Saling, Justice of the Peace for Upper Darby Township, Delaware County, appear in this court and answer the petition herein within fifteen days from the date of service, and it is

FURTHER ORDERED that the hearing on said petition and answers, if any, be fixed for April 18, 1927, at 10 o'clock A. M.

By THE COURT,
Attest:
GEORGE BRODBECK,
*Clerk.*

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At Chester, in my district, on March 29, 1927, served the within order of court upon William Ward, Jr., Prothonotary of Delaware County, by handing to him personally, a true copy thereof, together with a copy of the petition in re investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected, and making contents of the same known to him; and on March 30, 1927, at Upper Darby, in my district, served the within order of court upon John J. Saling, Justice of the Peace in and for Delaware County, by handing to him personally, a true copy thereof, together with a copy of the petition in re investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected, and making contents of the same known to him; and at Media, in my district, also served, on March 30, 1927, the within order of court upon Thomas Feeley, one of the County Commissioners of Delaware County, by handing to him personally, a true copy thereof, together with a copy of the petition in re investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected, and making contents of the same known to him.

So answers W. FRANK MATHUES,
*U. S. Marshal.*
Per S. A. CONNER,
*Chief Deputy.*

**MOTION TO DISMISS.**

(Filed April 18, 1927.)

And now, this day of April, 1927, Harry M. Birney, Jr., James M. Hamilton, Thomas F. Feeley and William Ward, Jr., the defendants in the above-recited case, by their attorney Albert J. Williams, Esquire, move the Court to dismiss the petition on the ground the Court has no jurisdiction.

ALBERT J. WILLIAMS,
*Attorney for Harry M. Birney, Jr., et al.*

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**ANSWER OF HARRY M. BIRNEY, Jr., JAMES M. HAMILTON, THOMAS F. FEELEY AND WILLIAM WARD JR.**

(Filed April 14, 1927.)

*To the Honorable Judges of Said Court:*

Harry M. Birney, James M. Hamilton and Thomas F. Feeley, Commissioners of Delaware County, and William Ward, Jr., Prothonotary of Delaware County, some of the defendants named in the petition filed in the above recited case, in answer to said petition say:

*First.*—We deny the jurisdiction of your Honorable Court to entertain said petition and make the order prayed for.

*Second.*—We deny that the petition sets forth any ground for equitable relief.

*Third.*—We deny the averments in paragraph 1 of said petition that the petitioner, Jerry C. South,

is the duly selected and appointed attorney and representative of the Special Committee of the United States Senate, referred to in said petition.

*Fourth.*—We have no knowledge as to the averments in paragraph 2 of said petition that said committee duly and legally appointed the petitioner, Jerry C. South, its representative, and attorney to act for it and in its name, in the several respects set forth in Exhibit "C," annexed to said petition and pray that said averments be proven if material. We deny that James A. Reed, chairman of said committee, had the right or authority to appoint the petitioner to act for and on behalf of the committee without being authorized and empowered to do so by the committee in meeting assembled. We further deny that either said committee or its chairman had the right to vest in the petitioner, Jerry C. South, the right and power to demand and take into his possession the ballot boxes and other election paraphernalia specified and mentioned in Exhibit "C," annexed to said petition, and to remove the same to the City of Washington, District of Columbia.

*Fifth.*—We admit the averments in paragraph 3 of said petition, that the petitioner called upon us and demanded that we respectively deliver to him all election paraphernalia in our possession appertaining to the election held on November 2, 1926, and that we refused to deliver the same to him until it should be determined that he is legally entitled to have the same delivered to him.

For further answer and defense to said petition we aver:

*Sixth.*—The life of said committee ceased at the end of the Sixty-ninth Congress on March 4th, last

past. It was appointed as a select committee of the United States Senate during the Sixty-ninth Congress. Such committees of the Senate do not continue beyond the termination of the Congress during which they are appointed unless the Senate by affirmative action provides that they shall. It has never been the practice of the Senate to recognize, and the Senate has never recognized such committees as continuing in force beyond the termination of Congress in which they are appointed, unless continued by affirmative action of the Senate itself. No such action was taken by the Senate with respect to the committee in question. The chairman of said committee, James A. Reed, did introduce for passage near the end of the Second Session of the Senate during the Sixty-ninth Congress, a resolution to continue said committee in force during the interim between the Sixty-ninth Congress and the Seventieth Congress, but it did not pass.

The following is the resolution which was introduced but not passed as aforesaid:

> "RESOLVED, That Senate Resolution Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.
>
> That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion, and/or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2nd day of November, 1926."

*Seventh.*—Resolution No. 324 of the United States Senate by which the petition of William B. Wilson contesting the election of William S. Vare, as a United States Senator from Pennsylvania, was referred to said committee, and by virtue of which the petitioner is demanding the ballot boxes and other election paraphernalia appertaining to said election, was superseded in the closing days of the second session of the Senate of the Sixty-ninth Congress, after the above quoted resolution to continue said committee in force, had been introduced, and it had become apparent it would not pass, by Senator Robinson of Arkansas presenting said petition of contest to the Senate and requesting that said petition be received, printed in the record and referred to the Committee on Privileges and Elections, whereupon the Vice-President announced that—"Without objection the petition will be received, printed in the record and referred to the Committee on Privileges and Elections." Annexed hereto and made a part hereof, marked Exhibit "A," is a copy of said petition of contest. The Committee on Privileges and Elections is a standing committee of the United States Senate, consisting of thirteen members.

*Eighth.*—Senator Keyes, chairman of the Senate, "Committee to Audit and Control of the Contingent Expenses of the Senate," which committee has control of the fund out of which Resolution No. 324 directed that the expenses of the Select Committee in question should be paid, denies the right of said committee to function since the close of the Sixty-ninth Congress and has refused and still refuses to advance it any monies to defray its expenses.

*Ninth.*—We are advised, believe and therefore aver, that the sergeant-at-arms of the Senate and his

deputies deny the right of said committee to function since the termination of the Sixty-ninth Congress and have refused to attend said committee and execute its directions.

*Tenth.*—Whatever election paraphernalia we have the custody of, we have by virtue of the mandate of the law of the Sovereign State of Pennsylvania, committed to our care and safekeeping as public officers. We deny the right of the petitioner, the committee he claims to represent and the United States Senate itself to take the same from our possession and remove it from the jurisdiction of the State of Pennsylvania.

Wherefore, we pray that said petition be dismissed and the petitioner be directed to pay all costs incurred in this proceeding.

HARRY M. BIRNEY, JR.,
JAMES M. HAMILTON,
THOS. F. FEELEY,
*County Commissioners.*
WILLIAM WARD, JR.,
*Prothonotary.*

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Harry M. Birney, Jr., James M. Hamilton, Thomas F. Feeley and William Ward, Jr., being duly sworn according to law, depose and say that the facts set forth in the foregoing answer are true to the best of their information and belief.

HARRY M. BIRNEY, JR.,
JAMES M. HAMILTON,
THOS. F. FEELEY,
WILLIAM WARD, JR.

Sworn and subscribed to before me this fourteenth day of April, A. D. 1927.

ROBERT GIBSON,
*Deputy Prothonotary.*

## EXHIBIT "A."

### COMPLAINT OF WILLIAM B. WILSON.

*To the Senate of the United States:*

Comes now William B. Wilson and files this his contest for a seat in the United States Senate as Senator from the Commonwealth of Pennsylvania and contests the seat claimed by William S. Vare for the term beginning March 4, 1927, and as grounds for this contest shows to this honorable body that heretofore the said William S. Vare was nominated at the primaries held on May 18, 1926, as the Republican candidate for United States Senator from Pennsylvania for said term, and that the said William B. Wilson was at the said primaries nominated for said Office and term on the Democratic ticket.

That there are in the said State 67 counties, divided into about 8,334 election precincts or divisions; that the election for said office was held on the 2nd day of November, 1926; that by the laws of the Commonwealth of Pennsylvania the votes cast in the various precincts or divisions are canvassed and counted by the judges, inspectors, and clerks of election in the precincts in which cast; that said various election precinct or division officials certify the results thereof to the prothonotaries or other authorized officials to receive such results in the counties in which the various precincts are situated; that within brief interval thereafter the county boards of canvassers scrutinize such returns and in accordance with the laws of the Commonwealth an abstract of the various returns is made and certified to the secretary of the Commonwealth.

That as a result of the canvass of the returns as certified to the Secretary of the Commonwealth of Pennsylvania, it was found that the said William S.

Vare was shown by the returns to have received 822,-187 votes for said office of United States Senator at said Election, and that the said William B. Wilson had received a total of 648,680 votes for said office, the difference thus giving the said Vare an apparent plurality of 173,507 votes and the said Vare's claims on the basis of such apparent plurality were submitted to the Governor of the Commonwealth of Pennsylvania, who refused to accord him a certificate of election in regular form, but issued to him one in which occurred the significant phraseology, that the said Vare "appears to have been elected."

For the purpose of this complaint the said Vare is hereinafter described as the claimant and the said Wilson as the contestant.

The said contestant, Wilson, avers on information and belief that in truth and in fact there were cast at the said election many thousand more votes for the contestant, Wilson, than were cast for the claimant, Vare, for said office of United States Senator from the Commonwealth of Pennsylvania for said term; and said contestant further avers that there were errors and irregularities in said election affecting the result which, if corrected, would show that this contestant received a majority of votes legally cast at said election for said office of not less than from 25,000 to 30,-000 votes.

That the illegalities complained of affecting the result are:

(a) That various local canvassing boards, especially in the cities, Pittsburgh and Philadelphia, unlawfully counted for said claimant, Vare, votes which in truth and in fact were cast for the contestant, Wilson.

(b) That a large number of ballots lawfully cast for the contestant, Wilson, were not counted for him

but were utterly ignored by various election boards in making up the count, and they were not returned for contestant, to whom they rightfully belonged.

(c) That many ballots in many precincts, duly marked and cast for the contestant, were rejected by the respective election boards and not counted at all.

(d) That many ballots bearing unlawful and distinguishing marks, many of them in the same handwriting, were illegally and unlawfully counted for the said claimant, Vare.

(e) That many ballots duly marked and cast for this contestant, Wilson, were wholly rejected and thrown out and not counted by many election boards on the unlawful and fraudulent pretext that they were not duly and properly marked for him, whereas in fact they were legally marked and legally cast for this contestant.

(f) Many ballots duly and properly marked and cast for the contestant were rejected and thrown out by many election boards on the illegal and fraudulent pretext that they were defective as bearing distinguishing marks, whereas in truth and in fact they bore no such marks and should have been counted for the contestant, Wilson.

(g) That in various election precincts or divisions votes were returned as cast for the claimant, whereas no such votes were cast and such pretended votes so returned represented no voter or voters in fact.

(h) That in various election precincts of the Commonwealth various persons not entitled to vote under the laws of the State were permitted to vote and of

such votes so cast the said claimant was returned as having received a large number thereof.

(i) Many ballots duly and legally marked and cast for the contestant, Wilson, were erroneously thrown out and not counted for the contestant by many of said election boards under erroneous interpretation of their duty.

(j) In many of the counties of the State the board of canvassers made and reported their results without having or examining poll books and talley sheets, nor in any way verifying the number of original votes as cast or the number of voters depositing their ballots at the respective precincts; the said contestant further alleging on information and belief avers that these conditions and those referred to in the preceding paragraphs were, and are, of common knowledge and notoriety, particularly in the counties of Philadelphia and Allegheny, and of corruptive influence in the counties of Delaware, Lackawanna, Luzerne, and Schuylkill, nor does this contestant confine his averments on information and belief to the counties named. On the contrary, he does not hesitate to declare on this basis that wherever the allied and amalgamated Republican machines of Pittsburgh and Philadelphia ramified throughout the State, fraud, intimidation, manipulation of the election machinery, and all the vices and devices of such methods were practiced.

(k) That in many counties of the State, especially in Allegheny and Philadelphia, the board of canvassers gave credit as votes cast for the claimant without returns from the office of the election precincts or divisions properly certified or verified, as required by the laws of the Commonwealth.

(l) That in various precincts of the State, while the election was still in progress and against the pro-

visions of the laws of the Commonwealth, the ballots cast were removed from the polling places prior to being counted, and ballot boxes taken therefrom into the possession of unauthorized persons and opportunity thereby afforded for fraudulent manipulation to such an extent that the votes from such precincts or divisions should be eliminated in determining the result of the election.

(m) That careful investigation has been made by distinguished citizens and civic organizations since said election to ascertain as far as may be detailed facts pertaining to the above averments and as to the conduct of the counting in the said election and as to the care of the ballots, and from such investigations and from other information reaching this contestant and his representatives he avers that the foregoing statements are true to the best of his information and belief.

Said contestant therefore comes to your honorable body, not only in his own behalf but on behalf of the electorate of Pennsylvania, and the people of the United States of America. It is his sincere and profound belief that upon a fair and lawful recount of the ballots legally cast and on the elimination of fraudulent returns he will be shown to be the duly and lawfully elected United States Senator from the Commonwealth of Pennsylvania; and that for all the purposes of truth and justice he therefore prays that your honorable body will so decide.

WILLIAM B. WILSON,
*Contestant.*
CHARLES A. DOUGLAS,
ROWLAND B. MAHANY,
DAVID WALLERSTEIN,
*Counsel.*

DISTRICT OF COLUMBIA, *ss.:*

William B. Wilson, being first duly sworn, upon oath deposes and says that he is the contestant named in the foregoing matter; that he has read the foregoing statement and knows the contents thereof; that the matters and things as therein set forth are true.

WILLIAM B. WILSON.

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Subscribed and sworn to before me this twenty-fifth day of February, 1927.

EUGENE COLWELL,
(Seal) *Notary Public, D. C.*
My commission expires December 4, 1930.

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## ANSWER TO PETITION BY JOHN J. SALING, ONE OF THE RESPONDENTS THERETO.

(Filed April 14, 1927.)

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John J. Saling, one of the respondents named in the petition filed in the above entitled action, for answer thereto, respectfully requests your Honorable Court to dismiss the said petition for the following reasons:

*First.*—Because "Exhibit A" and "Exhibit B" attached to the petition and purporting to be copies of Resolutions of the United States Senate bear no certification or other mark of any kind from, or by any official of the United States Senate attesting to their genuineness or accuracy.

*Second.*—Because the letter "Exhibit C" bears no seal or other mark which would indicate it to be, or identify it as a document issued officially by the Committee from whence it purports to come.

*Third.*—Because the letter "Exhibit C" quotes no resolution by the said committee, or other authority from said committee to its Chairman, authorizing the issuance of the instructions contained therein.

*Fourth.*—Because United States Senate Resolution No. 324 (Exhibit B), if it be a genuine and accurate copy, specifically directs the "Sergeant at Arms of the United States Senate and his deputies, to attend the said Special Committee and to execute its directions," and the petitioner is neither the sergeant-at-arms of the United States Senate nor one of his deputies, and is therefore without authority to support his petition.

*Fifth.*—Because Section 4 of United States Senate Resolution No. 324 (Exhibit B) specifically authorizes the Special Committee of Five organized under United States Senate Resolution No. 195 (Exhibit A) to "Appoint sub-committees of one or more MEMBERS with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony," but nowhere, expressly or by implication, in either of said Senate Resolutions can there be found any power or authority for the said committee, or the chairman or any member thereof to delegate the powers and duties of a sergeant-at-arms to any other person or persons, and the petitioner is therefore without standing in this court.

*Sixth.*—Because your respondent is the custodian of the ballot boxes and their contents, under and by virtue of the laws of the State of Pennsylvania, which provide that he is to surrender them only "to answer the call of any court or tribunal authorized to try the merits of such election," and your respondent denies

that under the United States Senate Resolution No. 195 (Exhibit A) and No. 324 (Exhibit B) the said Special Committee has any power or authority to try the merits of the election at which the said ballot boxes and their contents were used.

*Seventh.*—Because William B. Wilson, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania, and your respondent is informed and believes that said petition has been referred by the Senate of the United States to a regular standing Committee thereof, whose duty it is to try the merits of the said election and which regular standing Committee alone has the right, if such right exists, to demand the surrender of the ballot boxes now in the custody of your respondent.

*Eighth.*—Because your respondent is informed and believes that demand was made by the Special Committee of Five, from which the petitioner claims to obtain his authority, upon duly constituted officers and the sergeant-at-arms of the United States Senate that formal process should issue for the seizure of the ballot boxes in the custody of your respondent and that the issuance of such process and the service thereof was refused by the United States Senate through said officers and Sergeant-at-Arms for the reason that the authority of the said Special Committee of Five expired with the end of the Sixty-ninth Congress of the United States.

*Ninth.*—Because your respondent is informed and believes that demand was made by the Special Committee of Five, from whom the petitioner claims to obtain his authority, upon the regular disbursing officer for the United States Senate for such funds as were, or would be needed to seize the ballot boxes in

the custody of your respondent, and that the said demand was refused by the United States Senate through its said disbursing officer for the reason that the authority of the said Special Committee of Five expired with the end of the Sixty-ninth Congress of the United States.

*Tenth.*—Because the Sixty-ninth Congress of the United States no longer exists and no authority, express or implied, can be found in United States Senate Resolutions No. 195 and No. 324 (Exhibits A and B), to carry the authority and activities of the Special Committee of Five created by them, beyond the life of the Congress which adopted them.

*Eleventh.*—Because the custody of the said ballot boxes is vested in your respondent by the laws of the State of Pennsylvania, and any order or decree for the surrender of them by your respondent should be directed to him by a duly constituted court or tribunal of that State.

*Twelfth.*—Because the seizure of the ballot boxes in the custody of your respondent and their removal from Delaware County and the State of Pennsylvania would be inequitable, unjust and confiscatory, since such procedure would necessitate the purchase by the the County of Delaware of new ballot boxes, and the expenditure for the replacement of those in custody of your respondent would amount to over two hundred and fifty dollars ($250.00).

WHEREFORE, your respondent prays that this Honorable Court dismiss the petition at the cost of the petitioner.

Respectfully submitted,

JOHN J. SALING,
*Respondent.*

STATE OF PENNSYLVANIA,
COUNTY OF DELAWARE, *ss.*:

John J. Saling being duly sworn according to law, doth depose and say that the foregoing facts are correct and true to the best of his knowledge, information and belief.

Sworn and subscribed before me this fourteenth day of April, A. D. 1927. } JOHN J. SALING.

H. CATHERINE MILLER,
(Seal) *Notary Public.*
Commission expires March 23d, 1929.

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**PETITION OF JAMES F. WOODWARD FOR LEAVE TO INTERVENE AS A PARTY RESPONDENT.**

(Filed April 14, 1927.)

*To the Honorable, the Judges of the said Court:*

The undersigned, James F. Woodward, petitions this Honorable Court for leave to intervene as a party respondent in the above proceedings in this Court, for the following reasons:

*First.*—Your petitioner is a citizen and a taxpayer of the State of Pennsylvania, and as such presents this petition.

*Second.*—Your petitioner has a State-wide interest in each and every ballot cast in the State of Pennsylvania at the last general election held in every election precinct of the said State on November 2, 1926, for the reason that his name appeared upon every ballot in every such precinct, as a candidate for the office of Secretary of Internal Affairs, a constitutional office of the said State, and has been returned as elected to the said office.

*Third.*—Your petitioner was a candidate of the Republican Party on such ballots for the said office at the said election, but your petitioner will not be inducted into the said office, under the constitution and laws of the said State, until the first Monday of May, 1927, and, therefore, has a personal interest and a property right in the proper protection and safety and security of every election box in the State of Pennsylvania.

*Fourth.*—That your petitioner has been informed and verily believes that every election box containing the ballots cast at the said election, is now in the custody of properly constituted and authorized authorities, under the laws of the State of Pennsylvania, with the exception of the Allegheny and Philadelphia County boxes, which were removed by an order of the courts of Allegheny and Philadelphia Counties under an alleged agreement between two of the candidates upon the said ballot, but your petitioner avers that he was not consulted in the matter and never gave his (your petitioner's) consent to the said removal. Your petitioner therefore prays this court that he may become a party to the above proceedings, and that this petition and his answer to the original petition of the said Jerry C. South may become a part of the records of this court.

*Fifth.*—Your petitioner alleges that the said Jerry C. South is without authority to receive the said boxes of the said Delaware County, or any other county, and that the above-mentioned Investigating Committee has no existence in law, and neither the said Committee nor its chairman, has any authority to delegate the said Jerry C. South to receive the said ballot boxes. And further, that the said committee has no authority in law to investigate the said general election held on November 2, 1926.

*Sixth.*—Your petitioner also respectfully suggests that this Honorable Court is without authority in law to take jurisdiction in the said application of the said Jerry C. South.

*Seventh.*—Your petitioner relies upon his rights as a citizen, taxpayer, and a candidate upon the said ballots, to the end that this Court shall declare that the said Investigating Committee, nor any of its supposed delegated officers, shall violate the sovereign power of the State of Pennsylvania whose laws direct the proper custody, care and preservation of the said ballots.

*Eighth.*—Your petitioner also prays to be allowed to join in the answer of the above named respondents, and that the matters, things and law set up by the said respondents in their several answers, shall be taken as his further answer to the said petition.

Your petitioner therefore prays that the said proceedings be dismissed, with costs upon the said Jerry C. South, and he will ever pray, etc.

JAS. F. WOODWARD.

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STATE OF PENNSYLVANIA, }
COUNTY OF DAUPHIN, } *ss.*:

James F. Woodward, the above named petitioner, being duly sworn according to law, doth depose and say, that the facts set forth in the foregoing petition are just and true as he verily believes.

Sworn and subscribed to before me this 13th day of April, 1927. } JAS. F. WOODWARD.

HOWARD W. FRY,
(Seal) *Notary Public.*
My commission expires January 20, 1930.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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MARCH TERM, 1927. No. 4017.

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IN RE: INVESTIGATION BY THE UNITED STATES SENATE OF THE GENERAL ELECTION HELD NOVEMBER 2, 1926, AT WHICH A SENATOR FOR THE STATE OF PENNSYLVANIA WAS ELECTED.

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*James A. Reed, Charles L. McNary, William H. King, Robert M. LaFollette, Jr., Senators, constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Number 195 and 324 of the Sixty-ninth Congress, and Jerry C. South, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Number 195 and 324 of the Sixty-ninth Congress,*

Petitioners,

v.

*The County Commissioners of Delaware County, Pennsylvania, the Prothonotary of Delaware County; and John J. Saling, a Justice of the Peace in and for Delaware County; and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926.*

## PROCEEDINGS.

(Filed July 12, 1927.)

Philadelphia, Pa., April 18, 1927.

Before Hon. J. Whitaker Thompson, *Judge*.

Present:

Hon. William H. King,

Hon. Robert M. LaFollette, Jr.,

Jerry C. South, Esq.
For Petitioners.

Albert J. Williams, Esq.
For County Commissioners of Delaware County, and William Ward, Jr., Prothonotary of Delaware County.

John E. McDonough, Esq.
For James F. Woodward, Secretary of Internal Affairs.

David Wallerstein, Esq.
For William B. Wilson.

Henry W. Savidge, Esq.
For John J. Saling, Upper Darby, Justice of the Peace.

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Mr. McDonough: If the Court please, I have filed a petition on behalf of James F. Woodward, for leave to intervene as a party respondent in these proceedings.

The Court: Is there any objection?

Mr. South: No, sir.

The Court: It may be entered.

Mr. McDonough: We have, also, a motion to dismiss by Mr. Williams, as attorney for Harry M. Birney, Jr., *et al.*

Mr. Williams: Do you want to take that up at this time, your Honor?

THE COURT: I cannot dispose of it offhand. You have to understand that. Don't you think we better postpone argument on questions like that until after we get the facts before us, postpone the argument on the motion to dismiss?

MR. SOUTH: I think that that would be advisable.

THE COURT: You may proceed, Mr. South.

MR. SOUTH: Since the original petition was filed, we have prepared another one, amending it slightly, so as to meet some of the objections made by the answer—I only had an opportunity to see it, the first time, this morning. In other words, to make the petition a little more definite and certain. It is substantially the same as the original, but is made a little more definite and certain. The caption is the same as in the original: Investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected.

James A. Reed, Charles L. McNary, William H. King, Robert M. LaFollette, Jr., Senators, constituting a Special Committee of the United States Senate, acting under the authority of Senate Resolutions Numbers 195 and 324 of the Sixty-ninth Congress, and Jerry C. South, attorney, and representative for the said Special Committee of the United States Senate, appointed and acting pursuant to Senate Resolutions Numbers 195 and 324 of the Sixty-ninth Congress, Petitioners, v. The County Commissioners of Delaware County, Pennsylvania, the Prothonotary of Delaware County; and, John J. Saling, a Justice of the Peace in and for Delaware County, and all other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, who have custody of ballot boxes used at the General Election held in Delaware County, on November 2, 1926.

(1) On the twenty-sixth day of March, 1927, comes James A. Reed, Charles L. McNary, William H. King and Robert M. LaFollette, Jr., constituting a Special Committee of the United States Senate——

THE COURT: Do you think, Mr. South, it is necessary to take up the time to read the petition, as we have the petition on file. I have read the petition.

MR. SOUTH: Very well, your Honor, the issues, as I get them, in the case, really resolve themselves into two issues.

THE COURT: You might take up the separate paragraphs of the petition, and see whether they are denied in the answers. In that way, we will get down to some issues.

MR. SOUTH: I entered no general denial to the answers in reply to this petition.

THE COURT: But, the answers do deny some of the allegations in the petition.

MR. SOUTH: Yes, sir.

THE COURT: Well, let us find out which paragraphs of the petition are admitted, or as to which there is no denial.

MR. SOUTH: They denied the existed of this committee, claiming it went out of existence with the adjournment of Congress on the fourth of March, last. We allege that this committee is still acting as a committee.

MR. KING: Do counsel deny that Senator Reed and the other Senators named, are Senators of the United States, and that they were appointed a special committee by resolution of the Senate? I have a certified copy of it here, and will tender it as an exhibit, and ask that it be received.

MR. MCDONOUGH: It is not denied. We do not deny that the Senators named were appointed.

MR. KING: Is there any denial that an election was

held, that ballots were received, and that the ballots are in the custody of the person named?

MR. WILLIAMS: No, no denial of that.

MR. KING: Is there any denial that demand was made upon the custodian of the ballots, for the ballot boxes, and, or, any documents which were part of the election returns?

MR. WILLIAMS: No.

MR. KING: I have not seen a copy of the answer. May I be permitted, your Honor, to ask the gentlemen what issues are tendered by the pleadings? What do you consider to be the issues of fact, if any, and if not, what are the issues of law, if any?

(Informal discussion here ensued, off the record.)

It is conceded that Mr. South was appointed by the unanimous vote of the committee as its agent and representative and attorney, to make demand upon the parties who were the custodians of the ballots and papers referred to.

MR. MCDONOUGH: But, we are not willing to admit that it is relevant in this proceeding.

MR. KING: That may go in, subject to objection.

MR. MCDONOUGH: The petition filed here bases the action, such as it may be, upon two resolutions of the United States Senate. One of the resolutions provides that the directions of the committee shall be executed by the sergeant-at-arms in the Senate, and we are not prepared to admit that the committee of which Senator King speaks, had authority to repeal the resolutions which created their appointment, and to authorize the sergeant-at-arms of the Senate to execute different directions.

MR. WILLIAMS: All we are admitting is that the committee, in meeting assembled, did appoint Mr. South its attorney and representative. We admit that, subject to its relevancy.

MR. KING: I think it might be well to offer in evidence the resolutions under which the committee acts and functions, so that the Court may be fully advised.

THE COURT: It is all set out in the petition, is it not?

MR. SOUTH: Yes, as exhibits; but, to meet the objections raised in the answers, that there was no authentication of these resolutions, I have brought certified copies of the resolutions, under the seal of the Secretary of the United States Senate.

THE COURT: Don't you think it better to get the issues defined, first, and then offer evidence under such issues as are raised?

MR. SOUTH: I feel so.

THE COURT: There are two resolutions——

MR. KING: Numbers 195 and 324. Do you admit they were passed by the Senate?

MR. SOUTH: These are certified copies.

MR. WILLIAMS: We are simply admitting that the Senate passed those resolutions.

MR. KING: Is it admitted that the committee have not reported back to the Senate, and that there has been no resolution passed by the Senate discharging the committee?

MR. WILLIAMS: We neither admit nor deny that.

MR. KING: Well, it is a fact.

MR. MCDONOUGH: It was not pleaded in the petition filed. That is the reason we didn't make any response.

MR. SOUTH: There comes the point, where we don't know whether we agree or not, and that is on the second paragraph of this amended petition. I believe your Honor holds only the first. In the second paragraph of the amended petition, it reads:

> "Your petitioners aforesaid, the members of said Special Committee of the United States Senate appointed and acting under authority of said

> Senate Resolutions numbers 195 and 324 of the 69th Congress, of which James A. Reed, a Senator from the State of Missouri, is Chairman, and said Committee, acting under power granted under the Constitution of the United States in Article I, Section 5, to the United States Senate to be 'judge of the qualification and election of its own members,' and because of the failure and refusal of David S. Barry, Sergeant-at-Arms of the United States Senate to act for and carry out the orders of said committee, it has duly and legally constituted and appointed the petitioner Jerry C. South as its representative and attorney, with specific, definite and general powers to act for and in the name of said Special Committee, a copy of which appointment marked 'Exhibit C', is attached hereto and made a part of this petition."

The gentlemen admit that that action was taken, as I understand it, but the legal force of it, they question.

MR. MCDONOUGH: We do not admit that it is either relevant or competent.

MR. WILLIAMS: We do not admit the averment in that paragraph, "duly and legally constituted and appointed." We admit, however, that they did appoint Mr. South their agent.

MR. SOUTH: That leaves the question to be settled in law, by your Honor, as to whether the United States Senate, when one of its ministerial officers fails or refuses to act and carry out orders which, under the general rules of the Senate, he is supposed to do, and arbitrarily says: "I will not do it," whether the Senate then becomes impotent, and whether this committee, acting under the general powers of the Senate, becomes impotent, and whether he can tie-up the deliberate action of the United States Senate, taken after weeks and months of discussion. First and last, the powers that this committee has, and the investigation

it shall make, are questions of law which your Honor will have to settle.

THE COURT: We are not quite ready to start the argument.

As I understand it, the gentleman said that the Committee took such action, by unanimous consent; but, they deny their authority in law to take that action.

MR. WILLIAMS: Yes, sir.

MR. SOUTH: The other disputed points where we have an issue,—it is asserted in one paragraph of this petition that the Committee acting for the United States Senate, under its constitutional powers, have taken occasion to demand the ballot boxes in certain counties, and one particular county now in Pennsylvania. They admit the demand was made on several officers, but in the answer tendered, they allege that the action of the committee based as of the fourth of March—that it had no further powers.

Those two issues, as I see it, are the only issues before the Court. First, the power of the committee to continue over into the recess of the United States Senate, and the power of the Senate to substitute an officer to act for it, when their own officer should refuse or fail to act.

MR. KING: The latter question suggested by Mr. South, is not so controlling, for the reason that if it should be held—I don't know how it can be—that it may not designate any person to aid it in the execution of its functions and duties, the committee is here by Senator LaFollette, and myself, making demand, really in person, and representing the Senate of the United States as well as the entire committee and the entire Senate because we are acting under the authority of the Senate. So that our contention is that the Senators, themselves, or the committee could come in and demand the boxes without the intervention of

any agency, the sergeant-at-arms or any person specially designated. Obviously, they could name any person or persons to aid them in the discharge of their duties; a stenographer, or other agent, to collect and count the ballots. So that whether they can substitute somebody for the sergeant-at-arms, that is a question in the case which is not so important as to become vital, because the committee is here, and represents itself, and is asserting its right to make this demand upon the defendants in this action for the ballots and the necessary—using an expression made by one of our friends, awhile ago—paraphernalia of the election returns.

THE COURT: Does the other side agree that those are the only two issues? I want to get this down to some issue. The burden is upon the petitioner to establish authority.

MR. WILLIAMS: They are not the only two issues. We raised the question that this committee is a select committee, and that it has never been the practice of the United States Senate, and the Senate has never recognized the existence of such committees beyond the end of the particular Congress in which they are appointed, unless there has been a resolution passed continuing them. Do you admit that as a fact?

MR. KING: No, we do not admit that; but I will say to counsel that if an examination of the records of the Senate, and its Journal, would reveal that fact, I am entirely willing—and I am sure Mr. South is—that counsel may hand them to the Court upon concluding their investigation upon that matter, giving us a copy, and if it be a fact, why the Court may take it without formal proof.

MR. WILLIAMS: No, you are not on the exact point, Senator. I was not up to the point of stating that Senator Reed, chairman of this committee, did introduce such a resolution. I was not on that point. I

was simply on the point that it has always been the practice of the Senate to pass such a resolution to continue such a committee beyond the end of the Congress in which it was appointed.

MR. KING: I understood that, clearly. And, my reply was to that, namely, that I do not admit that that was the practice.

I do not admit it for the reason that I am not sufficiently advised, but I have said that counsel by examining the Journal, or the rules or the records of the Senate, could easily determine whether the statement made is correct; and, if it be so, without any formal proof other than calling our attention to the record, it may be offered subject to our objection as to its relevancy and materiality; because, in this case, may I say, there is a resolution here which authorizes this committee to sit at such times and places as it may deem fit, making it a continuing committee until its functions have been fully discharged, and it becomes *functus officio*, or is by some resolution of the Senate relieved from further responsibility in the matter.

MR. WILLIAMS: You are not referring now, to anything other than what is in either Resolutions 195 or 324.

MR. SOUTH: No, sir.

MR. KING: No. Those are the sources of our authorities.

MR. WILLIAMS: May we leave the point which I have just mentioned in this case, that we may have an opportunity to introduce proof to establish that practice of the Senate?

THE COURT: You may introduce any proof that is relevant, on either side.

MR. WILLIAMS: I mean, your Honor, that I haven't the proofs with me today to prove that that is the practice of the Senate, and would ask an opportunity to introduce such proofs.

THE COURT: Oh, yes.

MR. KING: There can be no objection to that, and after conference between counsel, when we examine the rules—we can get them in the library, no doubt—we can agree as to what the fact is. Then, subject to any objection which we desire to offer, counsel may tender it. We will not put him to tendering or making formal proof. It is a matter of record, and there will be no controversy as to what the record will show.

MR. SOUTH: May I ask the question—I presume when you say it has been the practice of the Senate, you are acting on the theory that the so-called Brookhart Committee did have its powers specifically extended?

MR. WILLIAMS: No.

MR. SOUTH: That has been the allegation made by two or three gentlemen, and circulated all through the press, but I have those resolutions here at your command if you want them, to show they were not.

MR. WILLIAMS: In response, we offer to prove that the chairman of this committee, James A. Reed, did introduce for passage near the end of the second session of the Senate of the Sixty-ninth Congress, the following resolution, to continue this committee in force during the interim between the Sixty-ninth Congress and the Seventieth Congress, but the resolution did not pass.

The following is the resolution:

> RESOLVED, That Senate resolutions numbered 195, 227 and 258 of the Sixty-ninth Congress, first session, and Senate Resolution numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the thirtieth day of December, 1927.

"That the Special Committee created pursuant to Senate Resolutions Number 195 of the Sixty-ninth Congress, First Session, is authorized in its discretion, and, or, at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine or tabulate any or all ballots and scrutinize all books, papers and documents which are now in his possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania, on the second day of November, 1926."

Will you admit that Mr. Reed did introduce such a resolution near the close of the second session of the Sixty-ninth Congress, and that the resolution did not pass?

MR. KING: If your Honor please, subject to our objection as to its relevancy and materiality—not as to the fact that it is not a certified copy; we have a certified copy here—a resolution was offered, and I have no doubt it is as counsel read it, but I think it would be better to offer this, as this is the resolution itself, with the heading and so on——

MR. SOUTH: He followed it verbatim.

MR. WILLIAMS: To keep our record straight, Mr. South just stated that he checked me as I read it. He said it is a verbatim copy. Now, can we have a plain admission of the fact that it was introduced and was not passed, subject to your objection, Senator King, as to its relevancy.

MR. KING: May it please your Honor, the clause stating that the chairman of said committee did introduce for passage near the end of the second session of the Senate, during the Sixty-ninth Congress, a resolution to continue such committee in force during the interim, we admit that that resolution was offered. We do not admit that it was necessary to continue it; that is a conclusion. And, we also admit that it was

not passed. We object to the admission of it, however, as immaterial and irrelevant.

THE COURT: You admit that the resolution, of which a copy is set out in the answer, was introduced and not passed?

MR. KING: Was introduced and not passed.

THE COURT: By Senator Reed?

MR. KING: By Senator Reed. I might add, your Honor, that the heading is not pleaded, the formal part of the resolution. That is not so material, however. I will state our position on that, at this time.

THE COURT: We just want whatever facts are admitted before you proceed with formal proof.

MR. WILLIAMS: Will you admit that after the introduction of this Reed resolution which we have just read, and which you say is numbered 364, that after the introduction of that, and before the close of the Senate—that is, the second session of the Senate of the Sixty-ninth Congress, that Senator Robinson of Arkansas presented the petition of William B. Wilson, contesting the election of Senator Vare, to the Senate, and requested that it be received, printed in the record and referred to this Committee on Privileges and Elections, and that thereupon the Vice-President announced, without objection, that the petition would be received, printed in the record and referred to the Committee on Privileges and Elections.

MR. SOUTH: What time do you refer to?

MR. WILLIAMS: Following the introduction of this resolution which you have said is number 324.

MR. KING: My recollection is—and I confess that it is not clear—that the resolution, memorial or petition offered by Senator Robinson was offered preceding the introduction of Senate Resolution Number 364. That, however, is a matter that can be easily verified; and, I have no objection to counsel offering proof as to the date, so that there can be no contro-

versy. But, we object to the offer of the resolution or memorial, whatever it is termed, upon the ground that it is wholly immaterial and irrevelant, not affecting in any way the issues involved in the matters under consideration by the Court.

MR. WILLIAMS: I might say, Senator Reed, that it is my understanding that the William B. Wilson petition contesting the election of Senator Vare, was first introduced in the United States Senate sometime in January of 1927; and it was following that introduction that Resolution 324 was passed. But, I am speaking of the re-introduction of that same petition. After Senator Reed had introduced Resolution No. 364, then Senator Robinson re-presented the William B. Wilson petition contesting the election, and then it was referred to the committee on privileges and elections.

MR. KING: That need not be the subject of controversy, because it can be so easily proven.

THE COURT: Yes. The purpose in offering that is, apparently, to establish the reference of this matter to that committee which the petition and the representative of the committee claims was referred to this special committee; is that it?

MR. WILLIAMS: Yes. That is raised in the seventh paragraph of the answer of the County Commissioners, where we claim that this action superseded the resolution 324 referring this contest to this committee.

MR. KING: It could not supersede it, because they did not pass it even if offered, and if he did offer it subsequent to the resolution, it would be wholly immaterial, because the Senate may submit the matter to two committees or more if it chooses; that is purely within the legislative discretion of the United States Senate.

THE COURT: I am not determining that question now, Senator King. I am trying to get what is averred by one side or the other—to get the issues defined.

MR. KING: May I say to counsel, that if they offer that petition, and it shows that it was subsequent to the Reed resolution you read in your answer, we would object to it as immaterial and irrelevant; and, to have the whole matter before the Court, if it received it, then you will admit that the resolution was offered in January by Senator Robinson.

MR. WILLIAMS: It is my understanding that it was offered first at some earlier date; the exact date I do not know. We can both check on the date, and on this record, and I will reduce all this to a sworn statement of facts to the Court.

I also wish to offer the petition of Mr. Wilson contesting the election of Mr. Vare. Do you agree to that being offered, going in evidence?

MR. SOUTH: It is immaterial and irrelevant; it has no connection with this matter.

MR. KING: I have no copy. If you will furnish us a copy, we will consider that it has been offered, and will take counsel's word for it that it is a correct copy. But, we object to it as being wholly immaterial and irrelevant.

MR. WILLIAMS: May we leave it this way, that you will check—I will let you have a copy of my answer, and you may check the copy of this petition annexed to our answer, as to whether or not it is a correct copy, and if so, it can be agreed, of record, that this copy is a correct copy of Mr. Wilson's petition contesting the election of Mr. Vare.

MR. SOUTH: I should object to it being offered in evidence. I have no doubt I will find it correct when I look at it, but it has nothing to do with this investigation.

THE COURT: What we are trying to do, now, is to find out whether that is a correct copy of the resolution. When he offers it in evidence, you may object.

MR. KING: I said to counsel that I would take their word that it is correct.

MR. WILLIAMS: We offer that petition of William B. Wilson, contesting the election of Mr. Vare, a copy of which is annexed to the answer of the County Commissioner's marked Exhibit "A."

MR. KING: We object to it as being immaterial and irrelevant.

THE COURT: I will overrule your objection for the present, and grant you an exception.

MR. WILLIAMS: I do not know how far the Court takes judicial cognizance of the Senate rules, but we do admit that the committee on privileges and elections is a standing committee of the United States Senate, consisting of thirteen members.

MR. KING: That is admitted, and I have the distinction of being the ranking Democrat on that committee, and have been for many years.

MR. WILLIAMS: And, that that committee, in the absence of anything to the contrary, is the committee which has jurisdiction of contested elections in the United States Senate?

MR. KING: That is not admitted. It is admitted only that it is a standing committee of the Senate and bears the name which you attribute to it. Its jurisdiction is to be determined by the Senate, and not by it.

THE COURT: As I understand it, the resolution carries with it a reference of this contested election, by Mr. Wilson, to that committee; and, your contention is, as I understand it, that that does not mean that the committee has exclusive power to act, but that it acts on what is referred to it; and that the same matter may be referred to other committees.

MR. KING: Absolutely. And, may I say, in order that there may be no misunderstanding, that the Select Committee, of which Senator Reed is chairman,

and Senators LaFollette, McNary and myself are members—Senator Goff recently having resigned because of absence from the country due to ill health—was appointed to make certain investigations, there being some question as to whether or not the standing committee to which counsel referred, unless given certain authority, would have no right to impound ballots. It would have no more authority to impound ballots than the finance committee or the judicial committee of which I am a member, or any other committee——

Mr. Williams: I object to the Senator's statements as a matter of evidence in this case.

The Court: I do not think the Senator expects them to be considered as a matter of evidence. He is merely telling what his contention will be before evidence is introduced. I do not see how this Court can take judicial notice of the rules of the Senate, unless they are introduced in evidence——

Mr. King: May I interrupt, your Honor, because counsel may not be advised of the fact that the reference of a matter to a committee gives it no jurisdiction. It has to have subsequent authority, money appappropriated. It cannot employ a stenographer; it cannot employ a messenger; it can do nothing except the money is appropriated, or authority subsequently conferred. If a matter is referred to a committee, it lies in a pigeon hole until proper authority is given, unless anterior to that time it has been given, and the committee has been quickened to life with respect to that particular matter.

Mr. Williams: I am not sure just what the state of the record is with reference to the introduction of this petition, and the reference of it to the Committee on Privileges and Elections. Do you admit that it was introduced following the introduction of the resolution which I will call a resolution to continue the committee, and that it was without objection, ordered by

the Vice-President, as President of the Senate, to be received, entered on the record and referred to the Committee on Privileges—just how much of that I am to understand is admitted; it is not clear to my mind.

MR. KING: I want to admit everything that is a fact. I will not withhold a single thing. I stated to counsel, what I shall state now, that my recollection is that it was introduced prior to this date.

I state to your Honor, and to counsel, that I may be in error, but counsel can easily verify it. It is a fact that it was introduced and referred to the committee. My only question is as to the exact date when it was submitted.

THE COURT: Those are facts which can be ascertained.

MR. KING: I think we have the records here.

THE COURT: Counsel can get together and agree.

MR. WILLIAMS: We offer to prove that Senator Keyes, chairman of the Senate Committee to Audit and Control the Contingent Expenses of the Senate, which committee has control of the funds out of which Resolution 324 directed that the expenses of the Select Committee in question in this case should be paid, denies the right of said committee to function since the close of the Sixty-ninth Congress and has refused and still refuses to advance it any moneys to defray its expenses.

MR. KING: We will admit that Senator Keyes, the chairman of the Committee to Audit and Control Contingent Expenses of the Senate, has stated that he would not honor any drafts drawn upon that committee to pay the expenses incident to the impounding of the ballots or the counting of the same.

Counsel has tendered the averment of the facts contained in the eighth paragraph of the Commissioner's answer. We admit that Senator Keyes, as

alleged in that paragraph, has refused to pay, and for the reasons stated; but we object to the proof as being wholly immaterial and irrelevant.

THE COURT: You admit the fact, but object to its relevancy.

MR. KING: We admit he claims that the committee does not function.

It is admitted that the sergeant-at-arms of the Senate refused to continue this committee and execute its directions; and, in a letter to the committee stated as follows in explanation of his refusal:

The chairman of the Committee to Audit and Control the Contingent Expenses of the Senate has already announced that he does not feel authorized, in view of his present information, to approve vouchers for the disbursement of money by the Select Committee authorized at the last session of Congress. I will repeat what I told you verbally, that I cannot carry out your directions until I have had time to consult with those whose opinions should have legal weight.

I have no desire to hamper the work of demanding, collecting and forwarding to Washington, of the ballots from the four counties in Pennsylvania, and will, with pleasure, do so when told by legal authorities that I am authorized to do so.

MR. KING: That is under date of the 19th of March.

Only so that the record will be clear, we object to that as wholly immaterial and irrelevant.

MR. SAVIDGE: The Mr. Keyes, who was chairman of that committee, is the man who reported favorably on Resolutions 324, the second resolution? Is he the Mr. Keyes, who, as disbursing officer, whose letter was just referred to, refused to authorize the expenditure of any money by this committee?

MR. KING: I make this admission only for the record, but object to its materiality and relevancy, that

Senator Keyes is chairman of the Committee to Audit and Control the Contingent Expenses of the Senate. If you want that fact, I think you ought to have it. However, that committee does not handle a single penny; it has no possession of the money, does not control it at all, and does not pay it out.

MR. MCDONOUGH: We simply want to identify the chairmanship of the two committees.

MR. SAVIDGE: And, he is the same Mr. Keyes, who, as chairman of the committee, reported favorably on the second resolution, the first, too, numbers 324 and 195?

MR. KING: Yes.

MR. SOUTH: Resolution 195 carried no appropriation in it. For that reason, it was referred to the committee to see how far the funds would go——

MR. SAVIDGE: Resolution 324, the special resolution authorizing the seizure of the ballots, was reported favorably by Mr. Keyes,—he was the one?

MR. KING: Yes; but I do not want to make the admission, may it please your Honor, that the Committee on Audit and Control, controlled the money. Its functions are entirely different. The money is in the possession of other officials of the Government, never has been in the physical possession, or under the physical control, of the Committee on Audit and Control.

THE COURT: I presume there are disbursements paid from time to time——

MR. KING: No, none. So that the procedure may be understood, if I may state, the money is appropriated to a contingent fund which is carried, as I recall, in the name of the Secretary of the Senate, and Mr. Pace, an official in the Capitol Building and connected with the Secretary's office, handles all money for contingent funds. He handles all the money and contingent funds, as well as compensation of Seators,

and he pays it out upon direction of the committees; and, it is contended by some that the vouchers must receive the approval of the Committee on Audit and Control.

THE COURT: Of which Mr. Keyes is chairman?

MR. KING: Of which Mr. Keyes is chairman. My contention is—I am speaking for myself only, now—that his approval, or the approval of his committee is not essential; that after that committee has passed as it did here, the resolution, it is referred back to the Senate, that that meets the requirements of the rules of the Senate. That is an approval which justified the Financial Secretary, or Clerk, to pay it out, upon the instructions of a chairman of any committee, standing or select.

I want to be entirely frank with the Court, and to say that my opinion is not entertained by many. It is entertained, I think, by some, but I will be frank to say to your Honor that the majority of opinions, I think, are against me. I wish to be entirely frank with the Court.

MR. SAVIDGE: The approval, however, of this committee will be necessary for the expenditures of such funds as would be needed to actually obtain these ballots?

MR. KING: I do not admit that. I admit, to the extent I have indicated, but the rule may be offered here, and His Honor can pass on that; but it is wholly immaterial and irrelevant. We can proceed, if we care to, without money obtained through its approval. This committee is not limited in its functions, or in the discharge of its duty, by the recalcitrancy of any official of the Senate.

THE COURT: I understood you to say, Senator, a short time ago, that no committee could function as to any matters concerning which there is any expense attached, unless there is an appropriation carried with

the resolution referring such matter to the committee, is that correct?

MR. KING: I did not mean to make it that broad, your Honor.

THE COURT: I thought when you said it that it was broader than you intended.

MR. KING: What I meant to say was that many matters were put in pigeon holes because they were not vitalized or quickened by subsequent authority. That is what I meant to say.

I contend that this committee, charged with this duty, may proceed regardless of the failure of Mr. Keyes to approve any of its vouchers. It is wholly immaterial.

MR. SAVIDGE: The question was asked for the purpose of it becoming a question for this Court to pass upon, as to the intent of the United States Senate with respect to this Special Committee of Five, as to whether it should or should not function after the Sixty-ninth Congress shall have ceased; and, this question was asked to throw light upon that.

MR. KING: I think the resolutions of the Senate are the best evidence as to the intention of the Senate, creating and defining the duties of this Special or Select Committee of the Senate.

MR. MCDONOUGH: There is one fact that the intervening petitioner desires to have of record, and that is that the ballots, possession of which are sought by this proceeding, not only contain the names of the candidates for the United States Senate, but also contain the name, among others, for state officers, in the same election, of James Woodward, a candidate for the office of the Secretary of Internal Affairs of Pennsylvania. Mr. Woodward's assumption of office will not be taken until the first Monday of May, 1927.

MR. KING: You admit, do you not—I am not familiar with your statute—that there is no contest which involves the validity of the election of Mr. Woodward, and that the time for filing a contest has expired, and that there is no challenge of his right to enter upon the duties of his office at the time indicated.

MR. MCDONOUGH: Those two propositions, I frankly admit. That is to say, in all probability he has a certificate of election, and the time for the contesting of that, under the Statutes of Pennsylvania has expired, but what the investigation that this committee is undertaking here may disclose, facts in connection with that, I am not prepared to say.

MR. KING: Your statute provides for the method of contesting elections, the time within which a contest shall be lodged, and for the issuance of certificates?

MR. MCDONOUGH: They do.

MR. KING: No contest has yet been lodged and the time has expired within which his right to hold the office can be challenged.

MR. MCDONOUGH: Yes.

MR. KING: So, we object to the tender of counsel. We admit his statement is true as to Mr. Woodward being elected, and having received his certificate, and so on, but we contend that the matter is entirely irrelevant and immaterial.

THE COURT: It will be admitted subject to the objection.

MR. WILLIAMS: We would like to offer in evidence the *Journal of the United States Senate,* so far as it relates to the matter in controversy.

THE COURT: I presume counsel can agree on the parts of it that are relevant, or claimed to be relevant.

MR. KING: There will be no controversy if we can go into some library, where the Congressional Records may be had.

THE COURT: You can agree, then?

MR. KING: Yes. Then it may be submitted to the Court.

MR. WILLIAMS: We also offer so much of the Rules of the United States Senate as applies to the matter in controversy.

MR. KING: I make that same suggestion, with the reservation that it is immaterial and irrelevant. When it is tendered we shall make such objection as Mr. South deems proper.

I think that is everything we have to offer.

MR. WILLIAMS: I handed up, gave to the clerk, the motion to dismiss. I ask whether that will be marked filed and take its place in the record, or does your Honor want to retain that——

THE COURT: No, that will be marked filed. These other papers are all originals, and they will be considered when the whole case is reviewed. Are there any other facts to be submitted?

MR. SOUTH: I know of no other pertinent ones.

MR. KING: I might say, that if the sergeant-at-arms refuses to act, or any other person, the committee itself, under the resolution, would have the right to demand the ballots—a member of the committee or the committee in its entirety. I before stated that Senator LaFollette and myself are here in court, and if there is any question as to Mr. South's right to demand the ballots, we, in behalf of our committee, are asking for the ballots.

THE COURT: It is your contention that any member of the committee or any two members of the committee of five have authority to act for the whole committee, without any resolution of the committee?

MR. KING: Absolutely, because the resolution creating us, says that one or more might act. Might I say that by a resolution, moved by Senator LaFollette, we were given authority for the committee to act by one member or more. Senator LaFollette made

the motion, and we have been acting repeatedly, one member alone. Senator Reed acted in Chicago, Senator McNary in Oregon, and I in Arizona.

THE COURT: The point is this, that it does not follow because five Senators are appointed on a committee, or because five members of any body are appointed on a committee, that one or more has the power to act. A committee usually acts by its majority, and in order to confer authority on members in the ordinary sense, the members of a committee must be authorized by some act of the committee. That is the reason I suggested that, though probably you left that off the record inadvertently, if that is the fact.

MR. KING: I thank your Honor for the suggestion. Might I say that Resolution 324 reads as follows:

> "That the said Special Committee may appoint Committees of one or more members with power and authority to act for the full Committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony."

THE COURT: That gives authority to make appointments.

MR. KING: Pursuant to that. I stated, as a matter of fact, that the full committee passed a motion offered by Senator LaFollette authorizing one or more of the committee to act with the full power and authority of the full committee. That resolution was adopted unanimously. Do you admit that? If not, Senator LaFollette and I can testify to it.

MR. MCDONOUGH: We will admit it.

MR. SAVIDGE: May I ask when the resolution of the committee was passed, authorizing one or more members?

MR. KING: In July; after the introduction of the second resolution.

MR. SAVIDGE: No. 324?

MR. KING: Yes.

MR. SAVIDGE: And, there was a special resolution by the committee authorizing one or more members to act, under Resolution 324?

MR. KING: Yes.

(Senator King and Mr. South argued to the Court in support of the petition filed, and Mr. Williams argued in opposition thereto, all of which argument, by direction, was not taken for the purpose of the record.)

MR. SOUTH: I ask that these letters, read by me in the course of the argument, be made part of the record.

(Copies of letters last above referred to by counsel for the petitioners, are as follows):

"UNITED STATES SENATE,
Committee on Foreign Relations
William E. Borah, Idaho, Chairman,

| | |
|---|---|
| Hiram W. Johnson, Calif. | Claude A. Swanson, Va. |
| George H. Moser, N. H. | Key Pittman, Nev. |
| Irvine L. Lenroot, Wis. | Joseph T. Robinson, Ark. |
| Frank B. Willis, Ohio. | Oscar W. Underwood, Ala. |
| George Wharton Pepper, Pa. | Thomas J. Walsh, Mont. |
| George P. McLean, Conn. | James A. Reed, Mo. |
| Walter E. Edge, N. J. | Pat Harrison, Miss. |
| Arthur Capper, Kans. | Jenrik Shipstead, Minn. |
| William M. Butler, Mass. | |

CORA RUBIN, *Clerk.*

March 8, 1927.

Hon. James A. Reed,
United States Senate,
Washington, D. C.

My dear Senator Reed:

I have your letter of March 5th. In reply will say that in my opinion your Committee has authority to proceed during the recess of the Senate, to take the testimony of witnesses, and to im-

pound the ballot boxes and election records, and to generally carry out the instructions of Resolution 195 and Resolution 324.

If you will recall, I expressed my views in regard to this matter during the debate upon this subject in the closing days of the session. As I understand, your Committee has never made a final report, has never been discharged, and that being the case, it seems to me under the decision of the Supreme Court in the Mal Dougherty case, you have all the authority to proceed you ever had.

Very sincerely,

(Signed) WILLIAM E. BORAH."

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"George W. Norris, Nebr., Chairman.

| | |
|---|---|
| William E. Borah, Idaho. | Lee S. Overman, N. C. |
| Richard P. Ernst, Ky. | James A. Reed, Mo. |
| Rice W. Means, Colo. | Henry F. Ashurst, Ariz. |
| J. W. Harreld, Okla. | Thomas J. Walsh, Mont. |
| Chas. S. Deneen, Ill. | Thaddeus H. Caraway, Ark. |
| Frederick H. Gillett, Mass. | William H. King, Utah. |
| Guy D. Goff, W. Va. | M. M. Neely, W. Va. |
| Arthur R. Robinson, Ind. | |

JOHN P. ROBERTSON, *Clerk.*

UNITED STATES SENATE

Committee on the Judiciary,

Washington, D. C.

March 14, 1927.

Honorable James A. Reed,
United States Senate,
Washington, D. C.

My dear Senator:

I have your letter asking my opinion as to whether the special committee of which you are Chairman, appointed under the authority of S. Res. 195, 69th Congress, 1st Session, and given additional powers under S. Res. 324, 69th Congress, 2d Session, has authority to proceed during the present recess to perform the duties imposed upon it by said resolutions.

Neither of said resolutions places any limitation whatever upon the Committee as to the time within which it shall complete its labor. In S. Res. 195 it is expressly stated:

> '. . . Said Committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary;'

and in said S. Res. 324, the Committee is given additional authority.

> 'To take possession . . . and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.'

And in said resolution it is given still further authority:

'To take and preserve all evidence as to the various matters alleged in said petition' (meaning the petition of contest filed by William B. Wilson against William S. Vare), 'including any alleged fraud, irregularity, unlawful expenditure of money and intimidation of voters or other acts or facts affecting the result of said election.'

Taking the two resolutions together, the authority of the committee seems to be as broad as language can make it. 'To take and preserve all evidence' means that the committee has undoubted authority to go fully into the question presented by the petition of the said William B. Wilson and to completely and fully inquire into any question that may become an issue in said contest. Nowhere in either of said resolutions is there any limitation whatever as to time and it would seem the only fair construction that could be placed upon the authority of the committee is that it should complete all questions involved

by either resolution; and unless the Senate, by some subsequent action, limits its authority as to time, its authority thus granted must continue until all questions involved in either resolution are completed. That the committee's work is not completed is shown by the fact that the committee has made several partial reports, each of which shows on its face that the work of the committee is still unfinished. The simple fact that the ballot boxes have been taken and not yet opened is full and conclusive proof that the committee has not yet finished its labors. The taking of ballot boxes without opening them and without examination of their contents shows on its face that the work of the committee is incomplete. The only object of taking possession of ballot boxes is to examine their contents, and until the ballots, themselves, contained in the boxes, are examined by the Committee, no conclusions can be drawn from this evidence. It would be like putting a witness on the stand and then neglecting to ask him any questions or make any examination. There can be no possible benefit in taking ballot boxes unless they are opened and their contents examined. The evidence is not the ballot boxes themselves but the ballots within the ballot boxes.

One of the questions you propounded is whether the adjournment of Congress on the fourth of March has, of itself, nullified all the authority given to the committee and thus terminated the life of the committee. The question involved is whether the Senate has authority to grant to a special committee the power to act and to continue its labors beyond an adjournment caused by the expiration of the terms of the Members of the House of Representatives and one-third of the terms of the Senators. The question, therefore, is: Is the Senate a continuing body? Does it expire like the House of Representatives, or, does it and its organization continue without interruption?

The Senate has always acted on the theory that it was a continuing body and that the expira-

tion of one-third of the terms of its members every alternate fourth of March did not, of itself, deprive the Senate of this attribute. The Supreme Court of the United States, in McGrain v. Daugherty, has recently decided this identical question. In that case, one of the questions involved was whether a special committee appointed during the 68th Congress could continue its work without further authorization during the 69th Congress. The Supreme Court, speaking through Mr. Justice Van Devanter, said:

'. . . The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.'

This so-called amendatory resolution was passed by the Senate on the fourteenth day of March, 1924, and reads in part as follows:

'Resolved, that Senate Resolution No. 157 agreed to February 29, 1924, be, and the same hereby is, amended to authorize the select committee created by said resolution, or any sub-committee thereof, to sit and perform its duties at such times and places as may be deemed advisable or necessary by said committee. . . .'

It will be observed that the language used in this resolution, which the Supreme Court held was sufficient to extend the authority of the committee beyond the Congress where it was originally created, is practically the same as the language thus empowering the committee contained in S. Res. 195, 69th Congress, First Session. The language in said S. Res. 195, under which your committee is authorized to continue its functions, is:

'. . . Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary';

The language of the resolution which the Supreme Court held was sufficient to extend the authority of a committee from one Congress to another, is:

'. . . To sit and perform its duties at such times and places as may be deemed advisable or necessary by said committee.'

It seems quite clear, therefore, that under the language of the Supreme Court, the special Committee of which you are Chairman has all the authority during the present recess that it ever had during the Congress which has recently adjourned.

Very truly yours,

(Signed) G. W. NORRIS."

"Albert B. Cummins, Iowa, Chairman.

| | |
|---|---|
| William E. Borah, Idaho. | Lee S. Overman, N. C. |
| George W. Norris, Nebr. | James A. Reed, Mo. |
| Richard P. Ernst, Ky. | Henry F. Ashurst, Ariz. |
| Rice W. Means, Colo. | Thomas J. Walsh, Mont. |
| J. W. Harreld, Okla. | Thaddeus H. Caraway, Ark. |
| Charles S. Deneen, Ill. | William H. King, Utah. |
| F. H. Gillett, Mass. | M. M. Neely, W. Va. |
| Guy D. Goff, W. Va. | |

MURRAY D. SMITH. *Asst. Clerk.*

UNITED STATES SENATE

Committee on the Judiciary.
March 15, 1927.

Honorable James A. Reed,
United States Senate,
Washington, D. C.

My dear Senator:

I have to acknowledge your communication of the 5th, enclosing copy of a letter to Senator William E. Borah, in which you request my opinion upon the three following questions affecting Senate Resolutions 195 and 324 of the 69th Congress. I take great pleasure in submitting to you the following answers to the questions propounded:

QUESTION NO. ONE.

Question 1: Has the Committee authority to proceed during the recess of the Senate to take the testimony of witnesses, although its authority was not specifically extended by resolution as was requested by Resolution 364?

This question involves essentially the life of Resolution #195 as affected by Resolution #324. In Resolution #195 adopted May 17, 1926, 'The Special Committee of Five' is directed and authorized on page 2, lines 14 to 19, 'to sit and act at such time or times and at such place or places as it may deem necessary; to require by subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.'

Obviously there is no time limitation set upon the life of this Committee to do the things just hereinabove specified; and under the authority conferred by the word 'act,' above quoted, the Committee is given the power fully to function in every particular within the scope and field of the duty imposed. The Senate is a continuous body. To borrow an analogy the Senate is similar to a court of justice. A court is a continuous institution. The judge may die or its sessions may come to a close, but the jurisdiction of the court as a court continues. Certainly any order duly made by the court to perform a specific act continues regardless of the death of the judge or the ending of the session of the court at which the order was entered. The language just above quoted in Question 1 empowers the Special Committee to sit and act at such time or times and at such places as it may deem necessary. To conclude that the authority here conferred expired with the 69th Congress is to by interpretation and inference read into Resolution 195 an express temporal limitation.

In Senate Resolution 324 adopted January 11, 1927, the said Special Committee as constituted under Senate Resolution 195 was given additional powers to take possession of and preserve all ballot boxes and other record books and documents used in the Senatorial election held in the State of Pennsylvania the second day of November, 1926, and said Committee was further expressly directed—

'To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election.' 'That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution numbered 195, 69th Congress, first session, with respect to the subject matter of that resolution.'

The Sergeant-at-Arms of the Senate was also directed to execute the directions of the said Special Committee; and it, the said Special Committee, was further directed especially to appoint sub-committee of one or more members with power and authority to act for the full committee in taking possession of this evidence, and as provided in said resolution 195, which was incorporated in and enlarged by the express wording of the language of Senate Resolutioin 324, 'to do such other acts as may be necessary in the matter of said investigation.' The entire purport of Senate Resolution #324 was to enlarge, continue and confer specific power and authority upon said Special Committee to impound and preserve the ballots, and investigate corruption, if any, in the said senatorial election held in the State of Pennsylvania November 2, 1926, and report its findings to the Senate of the United States, to the end that the Senate as a continuous body might be supplied with the evidence of fraud or corruption in said senatorial election, if any was found to have been committed. The very nature of the case required the impounding of the ballots in such election, and the counting them if corruption or fraud or either was to be found. To say that this might have been done in some court proceeding in the State of Pennsylvania is merely to beg the question now under discussion. It is the Senate of the United States that is ultimately to be affected by any such fraud or corruption and it is the Senate of the United States and it alone that should be called upon to exercise such jurisdiction. If this had been a long session of the Senate, there could be no question that the said Special Committee would have the authority to continue any such investigation. It being a short session, however, it was not physically possible for the Special Committee to make the report authorized and directed in Senate Resolution 324, between the 11th day of January, 1927, and the 4th day of March, 1927.

QUESTION NO. TWO.

Question 2. 'Has the Committee authority to impound the ballot boxes and election records which are not now in its possession (there being now in its possession such ballot boxes and records from Allegheny and Philadelphia Counties, Pennsylvania, but not from other parts of the State)?'

This question is answered in the affirmative. It was expressly stated in the second whereas clause of Resolution 324 adopted January 11, 1927, that unless certain evidence (which undoubtedly embraces among other matters the ballots cast) relating to said charges and said election is preserved for the use of the Senate, it will be lost or destroyed. Obviously the preserving intact the election records and the impounding the ballot boxes, the contents of which would contain the corroboration or the refutation of the election records, is the *sine quo non* of continuing and preserving the *statu quo*.

QUESTION NO. THREE.

Question 3. Has the Committee authority to proceed in any manner to carry out the instructions of Resolution 195 and Resolution 324, and therefore to open the boxes if it deems that necessary and to take the testimony of witnesses, or is the Committee completely paralyzed so that it can do nothing unless further authority is received from Congress?

In view of the preceding discussion, the Committee in my opinion clearly possesses the authority to proceed in any lawful manner deemed necessary to carry out the instructions of Resolutions 195 and 324. If it be said that the doing of these acts interfere with the general jurisdiction of the standing committee of the Senate known as the Committee on Privileges and Elections, it is a sufficient answer to say that the Senate by special resolution has seen fit to supersede by anticipation the doing of those things which the Committee on Privileges and Elections would have the authority to do if the Senate were in ses-

sion; or which the regular committee on Privileges and Elections would inherently possess the power and authority so to do through a sub-committee authorized to sit during the recess of the Senate, if it, the Committee on Privileges and Elections, had obtained prior to March 4, 1927, jurisdiction of the subject matter covered by the two resolutions just hereinbefore mentioned.

Obviously the said special committee would by a clear reading of the language contained in said resolutions possess the power and authority to open the boxes, if such a step became necessary and to take the testimony of witnesses if it, the said Special Committee, is to preserve and obtain the evidence relating to the charges of corruption alleged in the petition of William B. Wilson. If this power does not exist, how is it to determine and report to the Senate fraud, irregularity, or the 'other acts or facts affecting the result of said election'? Clearly under said Resolution 324 said Committee is vested with all the powers of procedure that it possessed under Resolution 195, and since, in view of the authority conferred by said two resolutions, it is expressly empowered 'to do such other acts as may be necessary in the matter of said investigation,' the said Special Committee would clearly, expressly as well as impliedly, possess the authority to open the ballot boxes and take the testimony of witnesses whenever such step or steps might to it seem necessary in the discharge of the functions expressly committed to it by said Senate Resolutions.

By way of summary: The said Special Committee of five is a special agency of the United States Senate empowered to do certain things, among which are to take possession and preserve all of the ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in the senatorial election held in the State of Pennsylvania on the second day of November, 1926; and to preserve all such evidence and any and all other acts or facts

affecting the result of said election; and to subpœna witnesses and to take any testimony which may relevantly show or tend to show the commission of fraud or the existence of corruption in the said senatorial election held in the State of Pennsylvania on the said second day of November, 1926. To say that in the doing of these things expressly deputed the said special committee is not permitted to open the ballot boxes when such step becomes materially necessary is to say that the Committee is to be curtailed and arbitrarily restricted in the subpœnaing and examining of witnesses,—steps absolutely essential to the discovery of fraud or the existence of intimidation and corruption in the holding of said general election. Concededly all doubt would have been removed if express language had been included in the resolutions empowering the Committee to open the ballot boxes and inspect their contents, but the absence of such express language is not an omission that should affect or can logically or reasonably obstruct the power of the Committee under all the circumstances of the case. To say that because such exact language is not thereby expressly included and stated in *haec verbis* is to deny to the language used the ordinary and usual meaning which any fair interpretation or construction would obviously and irrebuttably impute. Finally, to put it all in a word, there can be no question that the said Special Committee possesses during the present interim between the closing of the 69th and the beginning of the 70th Congress full power and authority to do the things expressly and necessarily conferred upon it by said Resolutions 195 and 324 in the same way and with the same force and effect as if the 70th Congress were now in Session.

Respectfully yours,

(Signed) GUY D. GOFF."

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Briefs to be submitted.

**ORDER.**
(Filed June 22, 1927.)

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And Now, to wit, this twenty-second day of June, 1927, it is Ordered, that the attorneys for the parties in this cause close the proofs in the cause within ten days from this date, and within that time file of record in the cause, copies of all documentary evidence offered by any party, and file of record any stipulations of counsel, as to facts agreed to, with copies of documents referred to for the consideration of the Court.

By THE COURT,

J. W. Thompson, *J.*

## CERTIFIED COPIES OF RESOLUTIONS.

(Filed July 12, 1927.)

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I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on February 7, 1924, as appears on page 138 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United States (Seal) of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS, 1st SESSION. S. RES. 147

IN THE SENATE OF THE UNITED STATES.

February 7, 1924.

Mr. LA FOLLETTE submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

February 7, 1924.

Reported by Mr. KEYES, without amendment; considered and agreed to.

RESOLUTION.

*Resolved*, That the Secretary of the Interior is directed to send to the Senate:

(a) Copies of all oil leases made by the Department of the Interior within naval oil reserve numbered 1, and, separately, naval oil reserve numbered 2, both in the State of California, and naval oil reserve numbered 3, in the State of Wyoming, showing as to each the claim upon which the lease was based or issued; the name of the lessee; the date of the lease; the area of the leased property; the amount of the rent, royalty, bonus, and all other compensation paid and to be paid to the United States.

(b) All Executive orders and other papers in the files of the Department of the Interior and its bureaus, or copies thereof, if the originals are not in the files, authorizing or

regulating such leases, including correspondence or memoranda embodying or concerning all agreements, instructions, and requests by the President or the Navy Department as to the making of such leases and the terms thereof.

(c) All correspondence, papers, and files showing and concerning the applications for such leases and the action of the Department of the Interior and its bureaus thereon and upon all the several claims upon which such leases were based or issued, all in said naval reserves.

(d) And all contracts for drilling wells on naval oil reserves, date and terms of same, reasons therefor, and the number and date of the drilling of wells on private lands adjacent to oil reserves.

*Resolved further,* That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the Senate.

*Resolved further,* That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpœnas or otherwise; to require

the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding 25 cents per hundred words, to report such hearings. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpœnas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. The expenses of said investigation shall be paid from the contingent fund of the Senate on vouchers of the committee or subcommittee, signed by the chairman and approved by the Committee to Audit and Control the Contingent Expenses of the Senate.

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(Endorsed: 68th Congress, 1st Session. S. Res. 147 Resolution Providing for an investigation of the subject of leases upon the naval oil reserves. By Mr. La Follette. February 7, 1924. Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. February 7, 1924. Reported without amendment; considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 1, 1924, as appears on page 182 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS, 1st SESSION. S. RES. 157

IN THE SENATE OF THE UNITED STATES.

February 13, 1924.

Mr. WHEELER submitted the following resolution; which was ordered to lie on the table.

February 16 (calendar day, February 19), 1924.

Modified, referred to the Committee to Audit and Control the Contingent Expenses of the Senate, and ordered to be printed.

February 26, 1924.

Reported by Mr. KEYES, without amendment.

February 29 (calendar day, March 1), 1924.

Considered, modified, amended, and agreed to; preamble withdrawn.

RESOLUTION.

*Resolved*, That a committee of five Senators, consisting of three members of the majority and two of the minority, be authorized and directed to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Antitrust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their coconspirators in defrauding the Government as well as

the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal Statutes, and his alleged failure to prosecute properly, efficiently, and promptly and defend all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate, and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States.

That said committee above referred to and the chairman thereof shall be elected by the Senate of the United States.

*Resolved further*, That in pursuance of the purposes of this resolution said committee or any member thereof be, and hereby is, authorized during the Sixty-eighth Congress to send for persons, books and papers; to administer oaths, and to employ stenographic assistance at a cost not to exceed 25 cents per hundred words, to report such hearings as may be had in connection herewith, the expenses thereof to be paid out of the contingent fund of the Senate, and that the committee, or any subcommittee thereof, may sit during the sessions or recesses of the Senate.

(Endorsed: 68th Congress, 1st Session. S. Res. 157 Resolution Directing a committee to investigate the failure of the Attorney General to prosecute or defend certain criminal and civil actions, wherein the Government is interested. By Mr. Wheeler. February 13, 1924. Ordered to lie on the table. February 16 (calendar day, February 19), 1924. Modified, referred to the Committee to Audit and Control the Contingent Expenses of the Senate, and ordered to be printed. February 26, 1924. Reported without amendment. February 29 (calendar day, March 1), 1924. Considered, modified, amended, and agreed to; preamble withdrawn.

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 14, 1924, as appears on page 207 of the Printed Journal of the Senate of the United States of America; for the First Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS, 1st SESSION. S. RES. 189

IN THE SENATE OF THE UNITED STATES.

March 11, 1924.

Mr. BROOKHART submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

March 14, 1924.

Reported by Mr. KEYES, without amendment; considered and agreed to.

RESOLUTION.

*Resolved*, That Senate Resolution Numbered 157, agreed to February 29, 1924, be, and the same hereby is, amended to authorize the select committee created by said resolution, or any subcommittee thereof, to sit and perform its duties at such times and places as may be deemed advisable or necessary by said committee, and to empower the chairman of said select committee, or any member thereof, to summon witnesses by subpœna or otherwise and to administer oaths to them.

(Endorsed: 68th Congress, 1st Session. S. Res. 189 Resolution Authorizing the select committee elected under Senate Resolution 157, agreed to February 29, 1924, to sit at such times and places as may be deemed advisable, and to summon and swear witnesses. By Mr. Brookhart. March 11, 1924. Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. March 14, 1924. Reported without amendment; considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on January 22, 1923 as appears on page 105 of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-seventh Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof,-are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United (Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

67th CONGRESS, 4th SESSION. S. RES. 398.

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IN THE SENATE OF THE UNITED STATES.

January 3 (calendar day, January 5), 1923.

Mr. HARRISON submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

January 16 (calendar day, January 19), 1923.

Reported by Mr. CALDER, with amendments.

January 21 (calendar day, January 22), 1923.

Considered, amended and agreed to.

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## RESOLUTION.

*Resolved*, That the President of the Senate appoint a committee to consist of five members of the Senate, three from the majority party and two from the minority party, to investigate problems relating to reforestation, with a view to establishing a comprehensive national policy for lands chiefly suited for timber production in order to insure a perpetual supply of timber for the use and necessities of citizens of the United States. The committee shall make a final report of its investigations with recommendations to the Senate not later than April 4, 1924. For the purposes of this resolution, the committee is authorized to sit

and act at such times during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses and in such places within the United States, to hold such hearings, and to employ such clerical and stenographic assistants as it deems necessary. The cost of stenographic service to report such hearings shall not be in excess of 25 cents per folio. The committee is further authorized to send for persons, books, and papers, to administer oaths, and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

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(Endorsed: 67th Congress, 4th Session. S. Res. 398. Resolution To investigate problems relating to reforestation. By Mr. Harrison. January 3 (calendar day, January 5), 1923.—Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. January 16 (calendar day, January 19), 1923.—Reported with amendments. January 21 (calendar day, January 22), 1923.—Considered, amended, and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on January 25, 1923, as appears on page 114 of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-seventh Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United States (Seal) of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

67th CONGRESS, 4th SESSION. S. RES. 411.

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IN THE SENATE OF THE UNITED STATES.

January 16, 1923.

Mr. MCCORMICK submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

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RESOLUTION.

*Resolved*, That the President of the Senate appoint a committee to consist of five Members of the Senate, three from the majority party and two from the minority party, to investigate the problem of a nine-foot channel in the waterway from the Great Lakes to the Gulf of Mexico. The committee shall make a final report of its investigations with recommendations to the Senate not later than May 1, 1924. For the purposes of this resolution the committee is authorized to sit and act at such times during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses and in such places within the United States, to hold such hearings, and to employ a stenographer and such other assistance as may be necessary. The cost of stenographic service to report such hearings shall not be in excess of 25 cents

per hundred words. The committee is further authorized to send for persons, books, and papers, to administer oaths, and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

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Endorsed: 67th Congress, 4th Session. S. Res. 411. Resolution Appointing a committee to investigate and report upon the problem for a nine-foot channel in the waterway from the Great Lakes to the Gulf of Mexico. By Mr. McCormick. January 16, 1923.—Referred to the Committee to Audit and Control the Contingent Expenses of the Senate.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 3, 1925, as appears on page 276 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS
2d SESSION

S. RES. 352

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IN THE SENATE OF THE UNITED STATES.

February 26 (calendar day, February 28), 1925

Mr. REED of Pennsylvania submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

February 26 (calendar day, March 3), 1925

Reported by Mr. MCKELLAR, without amendment; considered and agreed to.

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## RESOLUTION.

*Resolved*, That S. Res. 411, agreed to January 23, 1923, authorizing the appointment of a committee to investigate the problem of a nine-foot channel in the waterway from the Great Lakes to the Gulf of Mexico, is hereby continued in full force and effect during the Sixty-ninth Congress.

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(Endorsed: 68th Congress, 2d Session S. Res. 352 Resolution To continue the select committee on nine-foot channel from the Great Lakes to the Gulf By Mr. Reed of Pennsylvania February 26 (calendar day, February 28), 1925 Referred to the Committee to Audit and Control the Contingent Expenses of the Senate February 26 (calendar day, March 3), 1925 Reported without amendment; considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 2, 1923, as appears on page 220 of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-seventh Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

(Stamped in ink: ALL.)

67th CONGRESS, 4th SESSION. S. RES. 466

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IN THE SENATE OF THE UNITED STATES.

March 2, 1923.

Mr. REED of Pennsylvania submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

March 2, 1923.

Reported by Mr. CALDER, without amendment; considered and agreed to.

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RESOLUTION.

Whereas complaints are being made against alleged delay by the Veterans' Bureau in the adjustment of claims for relief of invalid and disabled veterans of the World War under the various Acts of Congress; and

Whereas it is claimed that there has been great and needless delay in the construction of hospitals and in providing proper hospitalization for the relief of disabled veterans, as a result of which much unnecessary suffering exists; and

Whereas it is claimed that an unnecessarily large proportion of the appropriations made by Congress for the relief of the veterans is being improperly consumed in overhead expense, duplication of duties, excessive rent of properties and quarters and in the employment of an unnecessarily large number of agents, doctors, inspectors, instructors, and other persons; and

Whereas it has been charged that certain sales of surplus property belonging to the Government and under the supervision of the United States Veterans' Bureau were made improperly: Therefore be it

*Resolved*, That a committee consisting of three Senators, Members of the Sixty-eighth Congress, to be appointed by the President of the Senate, is authorized and directed to investigate the leases and contracts executed by the United States Veterans' Bureau or the Treasury Department for vocational schools and hospitals and for the purchase, rentals, and sales of real estate and supplies used or to be used directly or indirectly by the Veterans' Bureau for the benefit of the veterans of the World War and the matters and conditions in the premises set forth and to report their findings, together with recommendations for the improvement of such conditions, to the next regular session of Congress. Such committee is authorized to sit during any recess of Congress and send for persons and papers, to administer oaths to witnesses, and to incur necessary expenses for clerical and other services not exceeding $20,000, which shall be paid out of the contingent fund of the Senate.

(Endorsed: 67th Congress, 4th Session. S. Res. 466. Resolution Authorizing the appointment of a committee to investigate the leases and contracts executed by the United States Veterans' Bureau, and for other purposes. By Mr. Reed of Pennsylvania. March 2, 1923.—Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. March 2, 1923.—Reported without amendment, considered, and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 3, 1923, as appears on pages 226 and 227, of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-seventh Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

67th CONGRESS, 4th SESSION. S. RES. 469.

IN THE SENATE OF THE UNITED STATES.

March 2, 1923.

Mr. WALSH of Montana submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

March 3, 1923.

Reported by Mr. CALDER, without amendment; considered and agreed to.

RESOLUTION.

*Resolved*, That a Senate commission is hereby created, to be known as the Senate Commission of Gold and Silver Inquiry, which shall consist of five Senators, three of whom shall be members of the majority party and two of whom shall be members of the minority party, to be appointed by the President of the Senate.

Said commission shall investigate and report to the Congress on January 1, 1924, upon the following subjects:

1. The causes of the continuing decrease in the production of gold and silver.

2. The causes of the depressed condition of the gold and silver industry in the United States.

3. The production, reduction, refining, transportation, marketing, sale, and uses of gold and silver in the United States and elsewhere.

4. The effect of the decreased production of gold and silver upon commerce, industry, exchange, and prices.

The said commission is further authorized—

1. To confer with citizens, associations, and corporations of foreign countries with a view to the stabilization and wider use of silver in exchange.

2. To propose, either formally or informally, to the President of the United States, or the heads of the proper departments, plans for negotiations with foreign governments to the same end.

The commission shall include in its report recommendations for legislation which in its opinion will tend to remedy existing conditions and shall specifically report upon the limitations of the powers of Congress in enacting relief legislation.

The commission shall elect its chairman, and vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

The commission or any subcommittee of its members is authorized to sit during the sessions, recesses or adjournments of the Sixty-seventh and Sixty-eighth Congresses in the District of Columbia or elsewhere in continental United States, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, to employ a stenographer at a cost not exceeding 25 cents per folio to

report such hearings as may be had in connection with any subject which may be before said commission, and to employ such personal services and incur such expenses as may be necessary to carry out the purposes of this resolution; such expenditure shall be paid from the contingent funds of the Senate upon vouchers authorized by the committee and signed by the chairman thereof.

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(Endorsed: 67th Congress, 4th Session. S. Res. 469. Resolution Creating the Commission of Gold and Silver Inquiry. By Mr. Walsh of Montana. March 2, 1923.—Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. March 3, 1923.—Reported without amendment; considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 12, 1924, as appears on page 203 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Senate of the United
(Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS
1st SESSION

S. RES. 168

IN THE SENATE OF THE UNITED STATES.

February 16 (calendar day, February 21), 1924.

Mr. COUZENS submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

March 3 (calendar day, March 5), 1924.

Reported by Mr. KEYES, with an amendment.

March 6 (calendar day, March 7), 1924.

Referred to the Committee on Finance.

March 10, 1924.

Reported by Mr. SMOOT, with amendments.

March 11, 1924.

Recommitted to the Committee on Finance.

March 11, 1924.

Reported by Mr. SMOOT, with amendments shown in italic small capitals.

March 12, 1924.

Considered, amended, and agreed to; preambles stricken out.

RESOLUTION.

*Resolved*, That the President of the Senate pro tempore or Acting President of the Senate pro tempore is authorized to appoint a special committee of five Members, three of whom shall be of the majority party and two of the minority party, which shall investigate the Bureau of Internal Revenue and report its findings together with recommendations for corrective legislation.

The committee is authorized to hold hearings, to sit during the sessions and recesses of the Sixty-eighth Congress

and to employ a stenographer at a cost not to exceed 25 cents per hundred words. The committee is further authorized to send for persons and papers; to require by subpœna the attendance of witnesses, the production of books, papers, and documents; to administer oaths; and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

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(Endorsed: 68th Congress 1st Session S. Res. 168 Resolution Authorizing the appointment of a special committee to investigate the Bureau of Internal Revenue. By Mr. Couzens. February 16 (calendar day, February 21), 1924. Referred to the Committee to Audit and Control the Contingent Expenses of the Senate. March 3 (calendar day, March 5), 1924. Reported with an amendment. March 6 (calendar day, March 7), 1924. Referred to the Committee on Finance. March 10, 1924. Reported with amendments. March 11, 1924. Recommitted to the Committee on Finance. March 11, 1924. Reported with amendments shown in italic small capitals. March 12, 1924. Considered, amended, and agreed to; preambles stricken out.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on February 26, 1925, as appears on page 245 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Sixty-eighth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United (Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

68th CONGRESS
2d SESSION

S. RES. 333

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IN THE SENATE OF THE UNITED STATES

February 3 (calendar day, February 9), 1925

Mr. COUZENS submitted the following resolution; which was referred to the Committee on Finance.

February 17 (calendar day, February 24), 1925

Reported by Mr. SMOOT, with amendments; referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

February 25, 1925

Reported by Mr. KEYES, with amendments; ordered to lie on the table.

February 26, 1925

Considered, amended, and agreed to

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RESOLUTION.

Whereas the select committee of the Senate appointed under authority of Senate Resolutions 168 and 211 of the Sixty-eight Congress to investigate the Bureau of Internal Revenue was instructed to report its findings; and

Whereas the committee has not completed a thorough inquiry and will be unable to do so before March 4, 1925: Therefore be it

*Resolved*, That the select committee of the Senate authorized in Senate Resolutions 168 and 211 of the Sixty-eighth Congress to investigate the Bureau of Internal Revenue and appointed under these resolutions, is hereby authorized and directed to continue its work after March 4, 1925, and that all authority granted in Senate Resolutions 168 and 211 of the Sixty-eighth Congress shall be and is continued under this resolution, and said committee shall make its report at the next regular session of Congress: *Provided, however*, That the representatives of this committee shall be withdrawn from the offices of the bureau by June 1, 1925, and hearings shall cease on or before that date and no original files shall be withdrawn after said date; but any papers or files requested by the agents of the committee on or before May 15, 1925, shall be available to the agents of the committee for examination for two weeks after the same are furnished.

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(Endorsed: 68th Congress 2d Session S. Res. 333 Resolution To extend the authority of the select committee of the Senate appointed under Senate Resolutions 168 and 211 of the Sixty-eighth Congress By Mr. Couzens February 3 (calendar day, February 9), 1925 Referred to the Committee on Finance February 17 (calendar day, February 24), 1925 Reported with amendments; referred to the Committee to Audit and Control the Contingent Expenses of the Senate February 25, 1925 Reported with amendments; ordered to lie on the table February 26, 1925 Considered, amended, and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 11, 1926, as appears on pages 222 and 223 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-ninth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United (Seal) States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Asst. Secretary.*

69th Congress
1st Session

S. RES. 162

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In the Senate of the United States

March 6, 1926

Mr. Robinson of Arkansas submitted the following resolution; which was ordered to lie over under the rule

March 11, 1926

Considered, amended, and agreed to

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## RESOLUTION.

*Resolved*, That a special committee composed of five Senators, three of whom shall be members of the majority (and include one who is a Progressive Republican), and two of whom shall be members of the minority, said committee to be appointed by the Vice President, is hereby authorized and directed to investigate the manner in which section 315 (the flexible provision) of the Tariff Act of 1922 has been and is being administered. The inquiry shall have particular reference to the regulations and procedure of the Tariff Commission, the powers exercised and the functions performed by said commission, and to the institution, investigation, hearing, and decision of cases arising under said section.

Said inquiry shall also comprehend the agents and processes employed by the Tariff Commission in proceedings to ascertain the difference in costs of production in the United States and in competing countries, as well as the method of ascertaining which country constitutes the principal competing country within the meaning of said Tariff Act of 1922.

The committee may inquire into any and all other facts, circumstances, and proceedings which it deems relevant in arriving at an accurate conclusion touching the operation and administration of the tariff laws. The committee shall also investigate the appointment of members of said commission and report to the Senate whether any attempt has been made to influence the official action of members of said commission by any official of the Government or other person or persons, and if so what were the means or methods so used.

The committee shall promptly report its proceedings, findings, and recommendations to the Senate.

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(Endorsed: 69th Congress 1st Session S. Res. 162 Resolution Authorizing and directing an investigation of the manner in which the flexible provisions of the Tariff Act of 1922 has been or is being administered. By Mr. Robinson of Arkansas March 6, 1926 Ordered to lie over under the rule March 11, 1926 Considered, amended, and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 22, 1926, as appears on page 248 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-ninth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United States (Seal) of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

HENRY M. ROSE,
*Assistant Secretary.*

69th CONGRESS
1st SESSION

S. RES. 178

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IN THE SENATE OF THE UNITED STATES

March 20, 1926

Mr. ROBINSON of Arkansas submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate

March 20 (calendar day, March 22), 1926

Reported by Mr. KEYES, without amendment; considered and agreed to

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## RESOLUTION.

*Resolved*, That the special committee created under Senate Resolution 162, agreed to March 11, 1926, to investigate the manner in which section 315 (the flexible provision) of the Tariff Act of 1922 has been and is being administered, be, and it is hereby, authorized to send for persons, books, and papers, to administer oaths, to employ stenographers, at a cost not exceeding 25 cents per hundred words, to report such hearings as may be had in connection with such investigation; and to employ such other assistants as the committee may deem necessary, the expenses thereof to be paid out of the contingent fund of the Senate, but not to exceed the cost of $10,000.

(Endorsed: 69th Congress 1st Session S. Res. 178 Resolution Authorizing the holding of hearings and the employment of clerical assistance by the special committee to investigate the administration of the flexible provision of the Tariff Act of 1922. By Mr. Robinson of Arkansas March 20, 1926 Referred to the Committee to Audit and Control the Contingent Expenses of the Senate March 20 (calendar day, March 22), 1926 Reported without amendment; considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on February 17, 1927, as appears on page 187 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Sixty-ninth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United States (Seal) of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

69th CONGRESS
2d SESSION S. RES. 357

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IN THE SENATE OF THE UNITED STATES

February 17, 1927

Mr. ROBINSON of Arkansas submitted the following resolution; which was considered and agreed to

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RESOLUTION.

*Resolved*, That the resolution (S. Res. 162) authorizing and directing an investigation of the manner in which the flexible provisions of the Tariff Act of 1922 has been or is being administered, agreed to March 11, 1926, be, and it is hereby, continued in full force and effect until the end of the first regular session of the Seventieth Congress.

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(Endorsed: 69th Congress 2d Session S. Res. 357 Resolution Continuing S. Res. 162, relating to tariff investigation. By Mr. Robinson of Arkansas February 17, 1927 Considered and agreed to.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on February 17, 1927, as appears on page 157 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Sixty-ninth Congress; and that the endorsements shown upon the printed copy of said resolution, hereto attached, in the caption thereof, are correct as appears from said Senate Journal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the United States (Seal) of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

69th CONGRESS
2d SESSION S. RES. 358

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IN THE SENATE OF THE UNITED STATES

February 17, 1927

Mr. ROBINSON of Arkansas submitted the following resolution; which was considered and agreed to

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RESOLUTION.

*Resolved*, That the resolution (S. Res. 178) authorizing the holding of hearings and the employment of clerical assistance by the special committee to investigate the administration of the flexible provision of the Tariff Act of 1922, agreed to March 22, 1926, be, and it is hereby, continued in full force and effect until the end of the first regular session of the Seventieth Congress.

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(Endorsed: 69th Congress 2d Session S. Res. 358 Resolution Continuing S. Res. 178, relative to hearings by special tariff investigation committee. By Mr. Robinson of Arkansas February 17, 1927 Considered and agreed to.)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| In re Investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected. | No. 4017 March Term, 1927. |

*James A. Reed, Charles L. McNary, William H. King, Robert M. LaFollette, Jr., Senators, constituting a Special Committee of the United States Senate, acting under the authority of Senate Resolutions numbered 195 and 324 of the 69th Congress, and*

*Jerry C. South, attorney and Representative for the said Special Committee of the United States Senate, appointed and acting pursuant to Senate Resolutions numbered 195 and 324 of the 69th Congress,*

Petitioners.

vs.

*The County Commissioners of Delaware County, Pennsylvania, the Prothonotary of Delaware County; and*

*John J. Sailing, a Justice of the Peace in and for Delaware County; and*

*All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, who have custody of ballot boxes used at the General Election held in Delaware County in November 2, 1926,*

Respondents.

## DOCUMENTARY EVIDENCE, WITH BRIEF, ADDENDA

In obedience to and in keeping with the order of the Court made June 22, 1927; Petitioners herein file herewith certified copies of Senate Resolutions, creating numerous Special Com-

mittees by the United States Senate and certain other Senate Resolutions, extending the term and (or) scope of the said Special Committees; the purpose in offering in evidence these certified copies, is to rebut the inference Respondents in this cause argue in their several briefs submitted, that the Courts should draw, because of the one time practice of the United States Senate, in continuing the term and scope of Special Committees existing at the time of adjournment of a session of the United States Senate, by a general resolution coupling Special Commitees with the Regular Standing Committees of the United States Senate.

We have heretofore in our arguments in reply admitted the contention of Respondents, that at certain dates, between the 62nd Congress and this date, the Senate had abstained from the practice of passing a general resolution coupling Standing and Special Committees, and that it finally, as urged by Respondents, made a standing rule of the Senate continuing all Standing Committees until the next session of the Senate, thus avoiding the necessity and waste of time, in the rush of a closing session of passing a continuing resolution.

But this proves nothing as to the policy or practice of the Senate as to its Special Committees.

Ever since the abandonment of the practice of passing a General Resolution, coupling Standing and Special Committees, the Senate has apparently adopted the policy of continuing its Special Committees by adopting resolutions, extending the time and scope for activities of its Special Committees, by their Special names and titles, to such time as suited the Senate's intention, or failing or positively refusing to continue them beyond time and scope fixed in the creating resolution, thus getting rid of such Special Committees as were no longer needed or useful, according to the Senate's judgment, and getting rid of useless employees and expenses, which could very well be hard to do, where the Senate by an old precedent, during the routine incident to a close adjournment, pro forma adopted (no objection, being heard) a general coupling resolution.

Illustrative of foregoing argument, we have offered here, certified copies of following mentioned Senate Resolutions, each of which passed between the 62nd and including the last or 69th Congress, clearly sets forth in apt language, the Senate's purpose in creating Special Committees, or continuing a committee theretofore created and fixing in these extension resolutions, the time and purpose for their extension.

| | | *Senator* |
|---|---|---|
| S. Res. 398—67th Cong.—Jan. | 22, 1923—Reforestration Committee never extended | Harrison |
| S. Res. 411—67th Cong.—Jan. | 25, 1923—Great Lakes—Gulf of Mexico Waterways further extended by | McCormick |
| S. Res. 352—68th Cong.—Mar. | 3, 1925— " | Reed of Pa. |
| S. Res. 466—67th Cong.—Mar. | 2, 1923—United States Veterans Bureau never extended | Reed of Pa. |
| S. Res. 469—67th Cong.—Mar. | 3, 1923—Gold and Silver Investigation never extended | Walsh of Montana |
| S. Res. 168—68th Cong.—Mar. | 12, 1924—Investigate Bureau of Internal Revenue extended by | Couzens |
| S. Res. 333—68th Cong.—Feb. | 26, 1925— " | Couzens |
| S. Res. 162—69th Cong.—Mar. | 11, 1926—Investigate, Flexible Tariff Provision extended by | Robinson |
| S. Res. 178—69th Cong.—Mar. | 22, 1926— " also by | Robinson |
| S. Res. 357—69th Cong.—Feb. | 17, 1926— " | Robinson |
| S. Res. 358—69th Cong.— " | 17, 1926— " | Robinson |
| S. Res. 147—68th Cong.—Feb. | 7, 1924—Investigation Interior Dept. Contracts on Oil Reserves followed by | LaFollette |
| S. Res. 157—68th Cong.—Mar. | 1, 1924—Investigation of Harry M. Daugherty, Atty. Gen'l. extended by | Wheeler |
| S. Res. 189—68th Cong.—Mar. | 14, 1924—Time extended to "sit and perform its duties at such times and places as may be deemed advisable or necessary by said Committee." | Brookhart |

| | | | *Senator* |
|---|---|---|---|
| S. Res. 195—69th Cong.—May 19, 1926— | To Investigate Expenditures, or to promote nominations of Political parties or election of any person to U. S. Senate at General Election 1926. | | Reed of Mo. |
| Authority to "sit and act at | such time or times and at such place or places as *it may deem* necessary, etc." | | |
| S. Res. 324—69th Cong.— | 1926—Continuing and imposing additional duties and giving additional money. | | Robinson. |

In conclusion we beg again to call attention to the character of the limitations as to time and scope of these Special Resolutions above cited.

They may be divided into two groups, the first group, in the original resolutions, limits the time for the respective committees and where dates extended, also limit as to time.

The second group beginning with the Senate Resolution 147—68th Congress by the lamented Senator Robert M. LaFollette, who soon thereafter fell ill and died, used the words of limitation "to sit and perform its duties at such times and places as it deems necessary or proper, etc."

This was followed three weeks later by Senate Resolution 157, March 1st, 1924 by Senator Wheeler, looking toward criminal prosecutions but limited to the 68th Congress, but as the end of the Congress approached, and the Department of Justice procured indictments of Senator Wheeler, Senator Brookhart offered Senate Resolution 189, which was passed March 14th, 1924, which uses the language, originated by Senator Robert M. LaFollette, as words of limitation, in a Senate Resolution, to wit:—"to sit and perform its duties at such times and places as may be deemed advisable or necessary by said committee, etc."

This is the resolution and language construed by the Supreme Court in McGrain vs. Daugherty.

Finally, introducing Senate Resolution, and procuring its passage in May, 1926, Senator Reed of Missouri, used the language of Senator LaFollette and followed by Senator Brookhart; to wit:—"empowered to sit and act at such time or times and at such place or places as it may deem necessary."

These are the reasons why the Petitioners herein deem it their duty to the United States Senate and to people whom they represent to come to the Judicial branch of the Government and ask that they be sustained in their efforts to perform their constitutional functions.

Very respectfully submitted,

JERRY C. SOUTH,
*Jerry C. South, Attorney for the Petitioners.*

## CERTIFIED COPIES OF RESOLUTIONS.

(Filed July 12, 1927.)

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of Rule XXV, of the Standing Rules of the Senate of the United States of America, as amended and adopted by said Senate on April 18, 1921, as appears on pages 44 and 45 of the Printed Journal of the Senate of the United States of America for the First Session of the Sixty-seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate (Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, that Rule XXV of the Standing Rules of the Senate be, and it is hereby, amended so as to read as follows:

1. The following standing committees shall be appointed at the commencement of each Congress, with leave to report by bill or otherwise:

Committee on Agriculture and Forestry, to consist of sixteen Senators;

Committee on Appropriations, to consist of sixteen Senators;

Committee to Audit and Control the Contingent Expenses of the Senate, to consist of five Senators, to which shall be referred all resolutions directing the payment of money out of the contingent fund of the Senate or creating a charge upon the same;

Committee on Banking and Currency, to consist of fifteen Senators;

Committee on Civil Service, to consist of eleven Senators;

Committee on Claims, to consist of thirteen Senators;

Committee on Commerce, to consist of sixteen Senators;

Committee on the District of Columbia, to consist of thirteen Senators;

Committee on Education and Labor, to consist of eleven Senators;

Committee on Enrolled Bills, to consist of three Senators, which shall examine all bills, amendments, and joint resolutions before they go out of the possession of the Senate, and which shall have power to act jointly with the same committee of the House of Representatives, and which, or some one of which, shall examine all bills or joint resolutions which shall have passed both Houses, to see that the same are correctly enrolled, and, when signed by the Speaker of the House

and President of the Senate, shall forthwith present the same, when they shall have originated in the Senate, to the President of the United States in person, and report the fact and date of such presentation to the Senate;

Committee on Expenditures in the Executive Departments, to consist of seven Senators;

Committee on Finance, to consist of sixteen Senators;

Committee on Foreign Relations, to consist of sixteen Senators;

Committee on Immigration, to consist of eleven Senators;

Committee on Indian Affairs, to consist of eleven Senators;

Committee on Interoceanic Canals, to consist of eleven Senators;

Committee on Interstate Commerce, to consist of sixteen Senators;

Committee on Irrigation and Reclamation, to consist of eleven Senators;

Committee on the Judiciary, to consist of sixteen Senators;

Committee on the Library, to consist of seven Senators, which shall have power to act jointly with the same committee of the House of Representatives;

Committee on Manufactures, to consist of eleven Senators;

Committee on Military Affairs, to consist of sixteen Senators;

Committee on Mines and Mining, to consist of nine Senators;

Committee on Naval Affairs, to consist of sixteen Senators;

Committee on Patents, to consist of seven Senators;

Committee on Pensions, to consist of eleven Senators;

Committee on Post Offices and Post Roads, to consist of sixteen Senators;

Committee on Printing, to consist of seven Senators, which shall have power to act jointly with the same committee of the House of Representatives;

Committee on Privileges and Elections, to consist of thirteen Senators;

Committee on Public Buildings and Grounds, to consist of thirteen Senators, which shall have power to act jointly with the same committee of the House of Representatives;

Committee on Public Lands and Surveys, to consist of thirteen Senators;

Committee on Rules, to consist of twelve Senators;

Committee on Territories and Insular Possessions, to consist of thirteen Senators;

2. The said committees shall continue and have power to act until their successors are appointed.

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the paper hereto attached is a true and correct copy of Rule XXV, of the Standing Rules of the Senate of the United States of America, as amended and adopted by said Senate on May 24, 1920, as appears on page 293 of the Printed Journal of the Senate of the United States of America for the Second Session of the Sixty-Sixth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That Rule XXV of the Standing Rules of the Senate be, and it is hereby, amended so as to read as follows:

1. Beginning with the Sixty-seventh Congress, the following standing committees shall be appointed at the commencement of each Congress, with leave to report by bill or otherwise:

Committee on Agriculture and Forestry, to consist of 15 Senators.

Committee on Appropriations, to consist of 15 Senators.

Committee to Audit and Control the Contingent Expenses of the Senate, to consist of 5 Senators, to which shall be referred all resolutions directing the payment of money out of the contingent fund of the Senate or creating a charge upon the same.

Committee on Banking and Currency, to consist of 13 Senators.

Committee on Civil Service, to consist of 11 Senators.

Committee on Claims, to consist of 13 Senators.

Committee on Commerce, to consist of 15 Senators.

Committee on the District of Columbia, to consist of 13 Senators.

Committee on Education and Labor, to consist of 11 Senators.

Committee on Engrossed and Enrolled Bills, to consist of 3 Senators, which shall examine all bills, amendments, and joint resolutions before they go out of the possession of the Senate, and which shall have power to act jointly with the same committee of the House of Representatives, and which, or some one of which, shall examine all bills or joint resolutions which shall have passed both Houses, to see that the same are correctly enrolled, and when signed by the Speaker of the House and President of the Senate, shall forth-

with present the same, when they shall have originated in the Senate, to the President of the United States in person, and report the fact and date of such presentation to the Senate.

Committee on Expenditures in the Executive Departments, to consist of 7 Senators.

Committee on Finance, to consist of 15 Senators.

Committee on Foreign Relations, to consist of 15 Senators.

Committee on Immigration, to consist of 11 Senators.

Committee on Indian Affairs, to consist of 11 Senators.

Committee on Interoceanic Canals, to consist of 11 Senators.

Committee on Interstate Commerce, to consist of 15 Senators.

Committee on Irrigation and Reclamation of Arid Lands, to consist of 11 Senators.

Committee on the Judiciary, to consist of 15 Senators.

Committee on the Library, to consist of 7 Senators, which shall have power to act jointly with the same committee of the House of Representatives.

Committee on Manufactures, to consist of 11 Senators.

Committee on Military Affairs, to consist of 15 Senators.

Committee on Mines and Mining, to consist of 9 Senators.

Committee on Naval Affairs, to consist of 15 Senators.

Committee on Patents, to consist of 7 Senators.

Committee on Pensions, to consist of 11 Senators.

Committee on Post Offices and Post Roads, to consist of 15 Senators.

Committee on Printing, to consist of 7 Senators, which shall have power to act jointly with the same committee of the House of Representatives.

Committee on Privileges and Elections, to consist of 13 Senators.

Committee on Public Buildings and Grounds, to consist of 13 Senators, which shall have the power to act jointly with the same committee of the House of Representatives.

Committee on Public Lands and Surveys, to consist of 13 Senators.

Committee on Rules, to consist of 12 Senators.

Committee on Territories and Insular Possessions, to consist of 13 Senators.

2. The Committees to Audit and Control the Contingent Expenses of the Senate, on Printing, and on the Library, shall continue and have the power to act until their successors are appointed.

Mr. Allison submitted the following resolution, which was considered by unanimous consent, and agreed to:

RESOLVED, That the standing and select committees of the Senate, as now constituted, be, and they are hereby, continued, with power to act until the first Monday in December, 1891, or until their successors are elected.

I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution passed by the Senate of the United States of America, on March 3, 1891, as appears on Page 229 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Fifty-first Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Gorman submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate, as now constituted, be, and they are hereby, continued, with power to act, until the first Monday in December, 1895, or until their successors are appointed; and that the Committee on Printing, as it may be constituted on the 3d day of March, 1895, be and it is hereby, authorized to sit during the recess of the Senate to perform such duties as may be required by law.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 2, 1895, as appears on Page 191 of the Printed Journal of the Senate of the United States of America, for the Third Session of the Fifty-third Congression.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Allison submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate as now constituted be, and they are hereby, continued until their successors are elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 3, 1897, as appears on Page 178 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Fifty-fourth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Platt of Connecticut submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate as constituted at the end of this session be, and they are hereby, continued until their successors are elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 3, 1899, as appears on Page 194 of the Printed Journal of the Senate of the United States of America, for the Third Session of the Fifty-fifth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Allison submitted the following resolution; which was considered by unanimous consent, and agreed to:

RESOLVED, That the standing and select committees of the Senate, as constituted at the end of this session, be and they are hereby, continued until the next regular session of Congress, or until their successors are elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 2, 1901, as appears on Page 274 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Fifty-Sixth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate (Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Allison submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate, as constituted at the end of this session, be and they are hereby, continued until the next regular session of Congress or until their successors are elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 3, 1903, as appears on Page 244 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Fifty-Seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate (Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Allison submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate as constituted at the end of this session be, and they are hereby, continued until the next regular session of Congress, or until their successors are elected.

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I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America on February 27, 1905, as appears on page 274 of the Printed Journal of the Senate of the United States of America for the Third Session of the Fifty-eighth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Allison submitted the following resolution; which was considered by unanimous consent, and agreed to:

RESOLVED, That the standing and select committees of the Senate as constituted at the end of this session be, and they are hereby, continued until the next regular session of Congress, or until their successors are elected.

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I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America on March 2, 1907, as appears on page 421 of the Printed Journal of the Senate of the United States of America for the Second Session of the Fifty-ninth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Aldrich submitted the following resolution, which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate, as constituted at the end of this session be, and they are hereby, continued until the next regular session of Congress or until their successors are elected.

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I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America on February 22, 1909, as appears on page 201 of the Printed Journal of the Senate of the United States of America for the Second session of the Sixtieth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Hale submitted the following resolution, which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate as constituted at the end of this session be, and they are hereby continued until the next Session of Congress or until their successors are elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America on March 2, 1911, as appears on page 229 of the Printed Journal of the Senate of the United States of America for the Third Session of the Sixty-first Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, District of Columbia, this 27th day of June, 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Martin submitted the following resolution, which was considered by unanimous consent and agreed to:

RESOLVED, That the standing and select committees of the Senate as constituted at the end of this session be, and they are hereby, continued until further order of the Senate.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America on March 1, 1913, as appears on page 257 of the Printed Journal of the Senate of the United States of America, for the Third Session of the Sixty-second Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Kern submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing committees of the Senate so constituted at the end of this session be, and they are hereby, continued until the next session of Congress or until their successors are duly elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 2, 1915, as appears on Page 169 of the Printed Journal of the Senate of the United States of America, for the Third Session of the Sixty-Third Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Kern submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing committees of the Senate as constituted at the end of this session be, and they are hereby, continued until the next session of Congress, or until their successors are duly elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on March 1, 1917, as appears on Page 214 of the Printed Journal of the Senate of the United States of America, for the Second Session of the Sixty-fourth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

Mr. Martin of Virginia submitted the following resolution; which was considered by unanimous consent and agreed to:

RESOLVED, That the standing committees of the Senate, as constituted at the end of this session, be, and they are hereby, continued until the next session of Congress, or until their successors are duly elected.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of a resolution agreed to in the Senate of the United States of America, on February 25, 1919, as appears on Page 178 of the Printed Journal of the Senate of the United States of America, for the Third Session of the Sixty-fifth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

On motion by Mr. Lodge,

ORDERED, That the standing committees of the Senate as constituted at the end of this session be, and they are hereby, continued until the next session of Congress or until their successors are duly elected.

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I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of an order agreed to in the Senate of the United States of America on January 17, 1921, as appears on page 58 of the Printed Journal of the Senate of the United States of America for the Third Session of the Sixty-sixth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That a committee, to be composed of three Senators appointed by the President of the Senate, is authorized and directed to investigate the subject of crop insurance, particularly with reference to (1) the kinds and costs of insurance now obtainable; (2) the adequacy of the protection afforded by such insurance; (3) the desirability of and practical methods for extending the scope of such insurance; and (4) the availability and sufficiency of statistics necessary to properly and safely issue additional crop insurance. Within six months after the adoption of this resolution the committee shall report to Congress the result of its investigations, together with its recommendations, if any, upon the most practical and efficient methods whereby the farmer can obtain, at a reasonable cost, adequate and safe crop insurance.

Such committee is authorized to hold hearings at such times and places as it may deem advisable, to send for persons and papers, to administer oaths, and to employ stenographers to report such hearings at a cost not exceeding $1.25 per printed page, to be paid from the contingent fund of the Senate.

I, EDWIN P. THAYER, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 341, agreed to in the Senate of the United States of America on September 9, 1922, as appears on pages 435 and 436 of the Printed Journal of the Senate of the United States of America for the Second Session of the Sixty-seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That the President of the Senate appoint a committee to consist of five members of the Senate, three from the majority party and two from the minority party, to investigate problems relating to reforestation, with a view to establishing a comprehensive national policy for lands chiefly suited for timber production in order to insure a perpetual supply of timber for the use and necessities of citizens of the United States. The committee shall make a final report of its investigations with recommendations to the Senate not later than April 4, 1924. For the purposes of this resolution, the committee is authorized to sit and act at such times during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses and in such places within the United States, to hold such hearings, and to employ such clerical and stenographic assistants, as it deems necessary. The cost of stenographic service to report such hearings shall not be in excess of 25 cents per folio. The committee is further authorized to send for persons, books, and papers, to administer oaths, and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 398, agreed to in the Senate of the United States of America, January 22, 1923, as appears on pages 105 and 106 of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That the President of the Senate appoint a committee to consist of five Members of the Senate, three from the majority party and two from the minority party, to investigate the problem of a nine-foot channel in the waterway from the Great Lakes to the Gulf of Mexico. The committee shall make a final report of its investigations with recommendations to the Senate not later than May 1, 1924. For the purposes of this resolution the committee is authorized to sit and act at such times during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses and in such places within the United States, to hold such hearings, and to employ a stenographer and such other assistance as may be necessary. The cost of stenographic service to report such hearings shall not be in excess of 25 cents per hundred words. The committee is further authorized to send for persons, books, and papers, to administer oaths, and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 411, offered in the Senate of the United States on January 16, 1923, as appears on page 91 of the Printed Journal of the Senate of the United States of America and agreed to in the Senate of the United States, January 25, 1923, as appears on page 114 of the printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-Seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That a Senate commission is hereby created, to be known as the Senate Commission of Gold and Silver Inquiry, which shall consist of five Senators, three of whom shall be members of the Majority party and two of whom shall be members of the minority party, to be appointed by the President of the Senate.

Said commission shall investigate and report to the Congress on January 1, 1924, upon the following subjects:

1. The causes of the continuing decrease in the production of gold and silver.

2. The causes of the depressed condition of the gold and silver industry in the United States.

3. The production, reduction, refining, transportation, marketing, sale, and uses of gold and silver in the United States and elsewhere.

4. The effect of the decreased production of gold and silver upon commerce, industry, exchange, and prices.

The said commission is further authorized—

1. To confer with citizens, associations, or corporations of foreign countries with a view to the stabilization and wider use of silver in exchange.

2. To propose, either formally or informally, to the President of the United States, or the heads of the proper departments, plans for negotiations with foreign governments to the same end.

The commission shall include in its report recommendations for legislation which in its opinion will tend to remedy existing conditions and shall specifically report upon the limitations of the powers of Congress in enacting relief legislation.

The commission shall elect its chairman, and vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

The commission or any subcommittee of its members is authorized to sit during the sessions, recesses, or adjournments of the Sixty-seventh and Sixty-eighth Congresses in the District of Columbia or elsewhere in continental United States, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, to employ a stenographer at a cost not exceeding 25 cents per folio to report such hearings as may be had in connection with any subject which may be before said commission, and to employ such personal services and incur such expenses as may be necessary to carry out the purposes of this resolution; such expenditure shall be paid from the contingent funds of the Senate upon vouchers authorized by the Committee and signed by the chairman thereof.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 469, offered in the Senate of the United States on March 2, 1923, as appears on page 219 of the Printed Journal of the Senate of the United States of America and agreed to in the Senate of the United States, March 3, 1923, as appears on page 227 of the Printed Journal of the Senate of the United States of America, for the Fourth Session of the Sixty-Seventh Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That the President of the Senate pro tempore or Acting President of the Senate pro tempore is authorized to appoint a special committee of five Members, three of whom shall be of the majority party and two of the minority party, which shall investigate the Bureau of Internal Revenue and reports its findings together with recommendations for corrective legislation.

The committee is authorized to hold hearings, to sit during the sessions and recesses of the Sixty-eighth Congress and to employ a stenographer at a cost not to exceed 25 cents per hundred words. The committee is further authorized to send for persons and papers; to require by subpœna the attendance of witnesses, the production of books, papers, and documents; to administer oaths; and to take testimony. The expenses of the committee shall be paid from the contingent fund of the Senate.

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I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 168, agreed to in the Senate of the United States of America, March 12, 1924, as appears on page 203 of the Printed Journal of the Senate of the United States of America, for the First Session of the Sixty-eighth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

RESOLVED, That the President of the Senate pro tempore is authorized to appoint a special committee of three Members of the Senate to investigate and report to the Senate as soon as practicable the facts in respect of the activities of the War Finance Corporation in distributing loans and advances for agricultural and livestock purposes in the State of Idaho, and particularly any alleged favoritism shown in such distribution to Frank R. Gooding, a Senator from the State of Idaho, or any member of his family, or any of his business associates.

The Committee is authorized to hold hearings, to sit during the sessions and recesses of the Sixty-eighth Congress and to employ such stenographic and other assistants as it may deem advisable. The committee is further authorized to send for persons and papers: to require by subpœna the attendance of witnesses, the production of books, papers, and documents; to administer oaths; and to take testimony. Subpoenas for witnesses shall be issued under the signature of the chairman of the committee. The cost of stenographic service to report such hearings shall not be in excess of 25 cents per hunderd words. The expenses of the committee shall be paid from the contingent fund of the Senate.

I, Edwin P. Thayer, Secretary of the Senate of the United States of America, do hereby certify that the above and foregoing is a true and correct copy of Senate Resolution Numbered 208, offered in the Senate of the United States on April 10, 1924, as appears on pages 265 and 266 of the Printed Journal of the Senate of the United States of America and agreed to in the Senate of the United States, June 7, 1924, as appears on page 471 of the printed Journal of the Senate of the United States of America, for the First Session of the Sixty-eighth Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate
(Seal) of the United States of America, at Washington, in the District of Columbia, this 27th day of June, A. D. 1927.

EDWIN P. THAYER,
*Secretary.*

By HENRY M. ROSE,
*Assistant Secretary.*

## OPINION UPON PETITION, ANSWERS AND PROOFS.

(Filed July 12, 1927.)

THOMPSON, *J.*

On March 26, 1927, Jerry C. South, as the attorney and representative of a Special Committee of the United States Senate, claiming to act under Senate Resolutions 195 and 324 of the Sixty-ninth Congress, brought suit by petition against the County Commissioners of Delaware County, the Prothonotary of Delaware County, and a Justice of the Peace for Delaware County, who are the custodians, under the law of Pennsylvania, of ballot boxes, ballots, return sheets, talley sheets, voters' lists, voters' check lists, ballot check lists, and registration lists, hereinafter for brevity referred to as the ballot boxes, employed and used in the said County at the general election on November 2, 1926, praying that process issue requiring the respondents to show cause why they should not deliver to him, as agent and representative, all ballot boxes used in Delaware County at the said election to be by him delivered to the Special Committee of the Senate for their use in an investigation pending before them.

An amended petition was subsequently filed, adding as petitioners Senators James A. Reed, Charles L. McNary, William H. King, and Robert M. LaFollette, Jr., alleging that they constitute such Special Committee, acting under authority of the said Resolutions.

Senate Resolution 195, agreed to by the Senate on May 19, 1926, authorizes the President of the Senate to appoint a special select committee to make investigation into the means used to influence the nomination of any person as a candidate for membership of the United States Senate.

"Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require by subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

"The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

"Said committee shall promptly report to the Senate the facts by it ascertained."

The Senators above named and Senator Goff of West Virginia were appointed members of the Committee authorized under the said Resolution. Subsequently, Senator Goff resigned from the Committee and the four Senators above named continued to act.

After the November election in 1926 in Pennsylvania, at which William S. Vare and William P. Wilson were opposing candidates for a seat in the United States Senate, and William S. Vare was declared duly elected, Mr. Wilson presented his petition to the Senate contesting the election of Mr. Vare, and on January 11, 1927, the Senate agreed to a resolution authorizing the Select Committee on investigation of expenditures in Senatorial primaries and elections to take and preserve evidence in connection with the election of a Senator from Pennsylvania on November 2, 1926, being Senate Resolution 324.

"(1) To take possession in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all

ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2nd day of November, 1926.

"(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election.

"(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

"(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony."

Thereafter, on February 17, Senator Reed, Chairman of the Committee created under Resolution 195 and having further authority conferred upon it by Resolution 324, submitted Senate Resolution 364, which is as follows:

"Resolved, That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

"That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-

ninth Congress, first session, is authorized in its discretion, and or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2nd day of November, 1926."

The Resolution was ordered to the calendar but failed of being voted upon for adoption before the adjournment of Congress on March 4.

It is alleged in the petition that on March 19, 1927, the Committee appointed Mr. South as its representative and attorney to take into his possession and seal all ballot boxes used at the said election and to securely keep them in some convenient place in the City of Washington for the use of the Special Committee authorized under Resolution 324 to investigate the said election; that the respondents, upon demand, refused to deliver any part of the ballot boxes demanded.

While the proceeding was commenced by petition and not by bill, although the petitioners are seeking an equitable remedy by mandatory injunction, no objections have been raised to the failure on the part of the petitioners to conform to the equity practise, and the informality of their pleading and of the process issued may be regarded as waived.

The several respondents answered denying the jurisdiction of the court, denying that the petition sets forth any ground for equitable relief and denying the authority of the Committee to vest in Mr. South the right and power to demand and take into his possession the ballot boxes and other election paraphernalia specified. The answer denies the authority of the Committee to act upon the ground that the life of the

Committee ceased at the end of the Sixty-ninth Congress on March 4, 1927; that the subject matter of Resolution 324 was superseded as the result of the action of Senator Robinson of Arkansas, who, during the closing days of the session, presented Mr. Wilson's petition of contest to the Senate and requested that it be received, printed in the Record, and referred to the Committee on Privileges and Elections, a standing Committee of the Senate under its rules, whereupon the Vice-President announced that "without objection the petition will be received, printed in the Record, and referred to the Committee on Privileges and Elections."

Without objection on the part of the petitioners, the petition of James F. Woodward to intervene as a party respondent, was granted. He intervened as a citizen and taxpayer and, upon the ground that he had a state-wide interest in the ballots cast at the November election for the reason that his name appeared upon every ballot for the office of Secretary of Internal Affairs and that he has been returned as elected to that office. As Mr. Woodward was inducted into office on the first Monday of May, 1927, and the period for contesting his election under the laws of Pennsylvania has expired, he has no further interest except as a citizen and taxpayer.

Motions to dismiss on the ground of want of jurisdiction were filed by all of the respondents, setting up substantially the same grounds of objection to the proceedings as set up in the answers. The petitioners contend that the court has jurisdiction under Section 24 of the Judicial Code, which reads as follows:

> "Section 24. The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof, authorized by law to sue."

It is frankly conceded that the petitioners cannot hope for the relief prayed for by mandamus. The writ of mandamus may issue as auxiliary to the exercise of jurisdiction conferred under the Constitution by Congress but not as an exercise of original jurisdiction. See Riggs v. Johnson County, 6 Wall. 166; Lower v. United States, 91 U. S. 537; *In re* Massachusetts, 197 U. S. 482; Knapp v. Lake Shore and Michigan Railway, 197 U. S. 536.

The petitioners contend, however, that the present suit is a suit in equity and that the court has jurisdiction upon the broad ground that jurisdiction in equity may be based upon the duty of the federal courts to render assistance to the national government by appropriate remedy in its exercise of a sovereign power or in the discharge of a sovereign duty vested in or imposed upon it by the Constitution, expressly or impliedly.

The reasoning upon which the claim is predicated is as follows. The Senate under the Constitution, Article 1, Section 5, has vested in it power to be the judge of the elections, returns, and qualifications of its own members; and, under Article 1, Section 4, has the power to legislate in conjunction with the House of Representatives upon the time and manner of holding senatorial elections. Through the exercise by the Senate of these sovereign powers vested in it, the federal government is enabled to prevent injury to the welfare of its citizens in Pennsylvania and elsewhere, arising from the improper conduct of senatorial elections and to secure to its citizens their common right of being represented by Senators of their choice. They cite as authority for that power vested in, and that duty imposed upon, them as representing the federal government the language of the Supreme Court in *In re* Debs, 158 U. S. 564, where the Supreme Court sustained an injunction granted by the Circuit Court re-

straining officers of a labor organization from obstructing or interfering with interstate commerce. The language cited is as follows:

> "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court" (P. 584.)
>
> ". . . whenever, the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, than the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." (P. 586.)

This broad doctrine of the right of the government as *parens patriae*, in promoting the interest of the public, to have the assistance of its courts by injunctive remedy to promote the public interest and prevent injury to public welfare is sustained by ample authority cited by the petitioners. United States v. San Jacinto Tin Co. (1888), 125 U. S. 273, 285; United States v. Bell Telephone Co. (1888), 128 U. S. 315, 367; United States v. Rickert (1903), 188 U. S. 432; Heckman v. United States (1912), 224 U. S. 413, 438-442, affirming United States v. Allen (C. C. A. 8th Cir.), (1910), 179 Fed. 13, 16-7, per Amidon, *J.*

And, in order to carry out the constitutional

powers and duties imposed upon the Senate in judging the election, returns, and qualifications of its members, it is settled authoritatively that the two Houses of Congress, in their special relations, possess not only such powers as are expressly granted to them by the Constitution but such auxiliary powers as are necessary and appropriate to make the express powers effective. Among these auxiliary powers is the power of inquiry, and, in its discretion, to conduct such inquiries through committees. McGrain v. Daugherty, 273 U. S. 135.

It is not denied by the respondents that the Senate, as such, or a committee duly acting under authority of the Senate, has these rights and powers auxiliary to those expressly granted by the Constitution or by law necessary to perform its constitutional functions, nor is it contended that it is not appropriate and necessary that, in view of the contest by Mr. Wilson, the Senate shall proceed to inquire whether he, the contestant, or Mr. Vare, the claimant, has been duly elected by a majority of the lawful votes cast, and that the Senate should, in the exercise of its judgment, determine that question. What the respondents do contend is that the petitioners do not constitute a committee of the Senate with power to make the inquiry and for that purpose to take into its possession the ballot boxes, for the reason that, while the Senate is a continuing body, and although one-third of its members go out of office at the expiration of each Congress, the remaining two-thirds still constitute the Senate, and it concededly has power to continue its committees under its practice or its resolutions, yet, under its practise and rules, a special or select committee, such as may be appointed in the manner the petitioners were, does not continue in power and authority after the end of the session; and, hence, the Committee created under Resolution 195 and having its powers extended by Resolution 324, ended its existence on March 4th, when the Senate Adjourned.

It is contended by the respondents that the practice of the Senate, as shown by the evidence, has been to continue special committees only by resolution, specifying their continuance after an adjournment or during a recess of Congress, or into and through a later session. In order to establish this practise, resolutions of the Senate have been offered in evidence which show that, from the close of the Fifty-first Congress in 1891, down to and including the Sixty-second Congress, with the exception of the Fifty-second Congress, standing and select committees have been continued by blanket resolution during the closing days of the session; that from the Sixty-third Congress to the close of the Sixty-sixth Congress, standing committees alone were continued by general resolutions; that by Rule XXV of the Standing Rules of the Senate, as amended and adopted on April 28, 1921, it is provided that all standing committees shall continue and have power to act until their successors are appointed.

It is also shown by resolutions offered in evidence that, in providing for the appointment of special committees by resolution, the life of the committee is provided for in various ways.

By Senate Resolution 341, agreed to September 9, 1922 (S. J., pp. 435 and 436), the Committee on Crop Insurance was required to report within six months after the adoption of the Resolution and was authorized to hold hearings at such times and places as it might deem advisable.

The Committee on Re-forestation, appointed under Senate Resolution 398 of the Sixty-seventh Congress on January 22, 1923 (S. J., pp. 105 and 106) was required to make its final report not later than April 4, 1924, and the Committee was authorized to sit during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses.

The Committee to Investigate the Problem of a Nine Foot Channel in the Waterway from the Great Lakes to the Gulf of Mexico, appointed under Senate Resolution 411, agreed to at the fourth session of the Sixty-seventh Congress on January 25, 1923 (S. J., p. 114), was required to report not later than May 1, 1924, and authorized to sit during the sessions or recesses of the Sixty-seventh and Sixty-eighth Congresses.

The Senate Commission of Gold and Silver Inquiry, appointed under Senate Resolution 469, agreed to at the fourth session of the Sixty-seventh Congress on March 3, 1923 (S. J., p. 219) was authorized to sit during the sessions, recesses, or adjournments of the Sixty-seventh and Sixty-eighth Congresses.

The Committee to Investigate the Bureau of Internal Revenue, appointed under Senate Resolution 168, agreed to at the first session of the Sixty-eighth Congress on March 12, 1924 (S. J. p. 203) was authorized to sit during the sessions and recesses of the Sixty-eighth Congress.

The Committee to Investigate the Activities of the War Finance Corporation, appointed under Senate Resolution 208 agreed to at the first session of the Sixty-eighth Congress on June 7, 1924 (S. J. p. 471) was authorized to sit during the sessions and recesses of the Sixty-eighth Congress.

The petitioners have offered in evidence certain resolutions.

Senate Resolution 352, agreed to at the second session of the Sixty-eighth Congress on March 3, 1925 (S. J. p. 276), continued in full force and effect during the Sixty-ninth Congress the Committee above referred to, to Investigate the Problem of a Nine Foot Channel in the Waterway from the Great lakes to the Gulf of Mexico.

Senate Resolution 333, agreed to at the second session of the Sixty-eighth Congress, on February 26, 1925 (S. J. p. 245), authorized the Committee to Investigate the Bureau of Internal Revenue, above referred to, to continue its work after March 4, 1925.

Senate Resolution 162, agreed to at the first session of the Sixty-ninth Congress on March 11, 1926 (S. J. pp. 222 and 223) authorized a committee of five to investigate the flexible provisions of the Tariff Act of 1922 and directed the committee to promptly report its proceedings to the Senate.

Senate Resolutions 357 and 358, agreed to at the second session of the Sixty-ninth Congress (S. J., pp. 157 and 187) continued in full force and effect the authority of the above committee until the end of the first session of the Seventieth Congress.

Senate Resolution 147, agreed to at the first session of the Sixty-eighth Congress on February 7, 1924 (S. J., p. 138) authorized the Committee on Public Lands to investigate the leases of the Department of the Interior upon naval oil reserves, and authorized the Committee to sit and perform its duties at such times and places as it deemed necessary, and was followed on March 1, 1924, at the first session of the Sixty-eighth Congress by Senate Resolution 157 (S. J., p. 182) authorizing the appointment of a committee of five to investigate the administration of the Department of Justice by Attorney General Harry M. Daugherty, and authorizing the Committee to sit during the sessions or recesses of the Senate.

Senate Resolution 189, agreed to at the first session of the Sixty-eighth Congress on March 14, 1924 (S. J., p. 207) authorized the committee created by above Resolution 157 to sit and perform its duties "at such times and places as may be deemed advisable or necessary by said Committee."

The two latter resolutions were under consideration by the Supreme Court in the case of McGrain v. Daugherty, 273 U. S. 135.

The petitioners rely upon the language of Mr. Justice Van Devanter in that case in passing upon the question whether the case had become moot when the opinion was rendered on January 27, 1927. The case came before the Supreme Court upon an appeal from the final order in a habeas corpus proceeding discharging Mally S. Daugherty, who was held in the custody of the Sergeant-at-Arms of the United States Senate under process of attachment issued from the Senate in the course of an investigation being conducted by the Senate through the select committee. The respondent having failed to appear in answer to subpœnas, the President of the Senate pro tempore by authority of the Senate issued a warrant commanding the Sergeant-at-Arms or his deputy to arrest the respondent and bring him before the bar of the Senate to answer such questions pertinent to the matter under inquiry as the Senate might order the President of the Senate pro tempore to propound.

Mr. Justice Van Devanter's language is as follows:

> "Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: 'Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches.

When done, it is by a bill constituting them commissioners for the particular purpose.' But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

"Mr. Hinds in his collection of precedents says: 'The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress'; and, after quoting the above statement from Jefferson's Manual, he says: 'The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress.' So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measureably like that in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 514-516, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect and the investigation

proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited."

The situation in the instant case is not on all fours with that in McGrain v. Daugherty. The process in that case indisputably came from the Senate acting as such, and not through a committee. The District Court had discharged the relator, mainly upon the ground that the Senate had in contemplation the possibility of taking action other than legislation as an outcome of the investigation and was, therefore, exercising a judicial function not conferred upon the Senate. Mr. Justice Van Devanter construed the language authorizing the committee to sit at such times and places as it might deem advisable or necessary, as apparently changing the terms of the original resolution ordering the investigation and appointing the committee. His conclusion that the question of the validity of the attachment for contempt was not moot, however, was not said to be for that reason but because the committee might, at all events, be continued or revived by motion to that effect if the Senate should conclude to continue the inquiry through that committee.

It is contended by the respondents that the series of resolutions offered in evidence show that the authorization to sit at such times and places as a committee deems it necessary or advisable, does not relate to the life of the committee but merely gives it authority, until the end of the session, or until, by the terms of the resolution, its time to report has expired, to hold its sessions when and where it may be deemed necessary or advisable without regard to the duty of its members to be present at the sessions of the Senate. It is contended that this is shown by the fact that the Senate has discontinued its former practice

continued for many years, of coupling by general resolution the continuance of the functioning of its special committees and regular standing committees and that the practice indicates that the scope of the committee's activities ends at the adjournment of the Senate unless it is expressly authorized to sit and act during recesses or adjournment.

It appears, so far as the evidence introduced here is concerned, that Senate Resolution 147 of the Sixty-eighth Congress for investigation of Interior Department contracts on oil reserves was the first instance in which the committee was authorized "to sit and perform its duties at such times and places as it deems necessary or proper" and that Senate Resolution 189, adopted at the same Congress and which was considered by the Supreme Court in McGrain v. Daugherty, followed in substance the language used in Senate Resolution 147.

It does not appear whether the precedents offered to establish the practice of the Senate were or were not considered by the Supreme Court in the McGrain v. Daugherty case. In that case the Senate, and not the committee, had ordered its process issued and its Sergeant-at-Arms to execute the same to bring Mally S. Daugherty before the bar of the Senate to answer such questions as the Senate might order its presiding officer to propound, and to keep him in custody to await the further order of the Senate. The proceeding was upon a writ of habeas corpus. The writ of habeas corpus is a writ guaranteed by the Constitution for the purpose of inquiring into the cause of restraint of liberty. That is a judicial function. Both the Supreme Court and the District Courts have power to issue the writ, and, if an unlawful restraint is found, to discharge the relator from custody. The right to have the writ issued is a constitutional right. Therefore, in habeas corpus cases and in other cases in which

the courts are given jurisdiction under the Constitution and laws passed by Congress to determine questions of life, liberty, or property between the individual and one depriving him of those rights, a court having jurisdiction may determine whether the authority claimed by virtue of the constitutional powers of the Senate exists, and it may pass upon those powers and determine the rights of the parties.

In the instant case, the petitioners come into court alleging that they are a committee continuing in existence after the session of Congress at which they were appointed, and asserting that they have delegated to them the power of the Senate; that the exercise of that power has been denied them by the Sergeant-at-Arms, the officers of the Senate who was directed to carry out their orders for the subpœnaing of witnesses and the taking of possession of books, papers, and ballot boxes. If their resulting situation had arisen while the Senate was in session, the question of their authority to act and to have the Sergeant-at-Arms comply with their orders, would be determined by the Senate itself. Whether or not, if a remedy through the courts be open to them, it would be by proceeding in a court having jurisdiction over the person of the Sergeant at Arms, has not been considered or suggested by either party. The petitioners have brought their suit in the Court within the jurisdiction in which the ballot boxes and election paraphernalia are held, and are asking this court to decide a question which they would, no doubt, have had recourse to the Senate to decide if the Senate were in session, and it would not have occurred to any one to invoke the aid of a court if it were not that the Senate has adjourned.

In order to establish the right claimed, it is encumbent, therefore, upon the petitioners to establish the fact that they were, at the time suit was brought and are now a de jure committee of the Senate having

all the power conferred upon them by Senate Resolution 324. That power is disputed and this court is asked to determine, from the evidence supplied by former resolutions of the Senate and consideration of the resolution under which the petitioners claim to act, together with the resolution referring the election contest to the Standing Committee on Privileges and Elections, that the rule established by the precedents and practise of the Senate has been and is to continue its special committees after adjournment wherever the language used is such as is contained in Resolution 195. Nevertheless, Senator Reed, the Chairman of the Committee, offered, during the closing days of the session, Senate Resolution 364 for the purpose of continuing the existence of the Committee after adjournment and the members of the Committee are here in court because the Senate failed to act upon that resolution. It is the very foundation of the suit, if the suit is to be maintained, that the Court must determine the effect of the resolution of the Senate under which the Committee claims to act in view of the precedents and practise of the Senate, because, if the Committee has the authority it claims, it must be because they have that right under the authority and sanction of the Senate itself.

It is established that the Senate may and does delegate such power as is claimed to its committees. That it did give power to the committee in this case. But has it given the power to continue to function after the adjournment? We must meet squarely then the question whether the Court has power under the Constitution or the laws to determine this fundamental question.

It is provided in the Constitution, Article 1, Section 5, 2, that "each House may determine the rules of its proceedings." The reference of investigations instituted by the Senate to committees, the regulation of

the mode and manner of the procedure of its committees, and of the times when and places where the committee shall perform its duties and exercise its powers, are a part of the determination of the rules of proceedings under which the functions of the Senate, in judging under the Constitution the election, returns, and qualifications of its members are performed, and the mode and manner in which the powers delegated for those purposes to the committee are to be exercised, is for the determination of the Senate alone, whether it determines them by its standing rules or in accordance with its practise established by precedent. It cannot reasonably be contended that, where the Constitution uses the term "rules of its proceedings," the words were used in the narrow sense of such standing rules as the Senate may from time to time adopt, or that the effect of its resolutions and the mode and manner of determining their effect is to be determined by the courts in case individual members of the Senate shall disagree or in case a committee not having immediate access to the Senate as a sitting body may desire to have them interpreted.

The Constitution divides the powers of the government which it established into the three departments: the executive, the legislative, and the judicial; and no unlimited power is conferred on any department or officer of the government. The judicial power is vested in the Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. The District Courts, being created by Congress, derive their power exclusively from Congress through such legislation as it may see fit from time to time to enact, and it cannot confer any power upon a court unless the authority to confer such power is found in the Constitution. The power to determine the rules of the Senate proceedings is conferred upon the Senate alone but in cases or controversies such, for instance, as

habeas corpus proceedings, in which the constitutional power is conferred upon the court, the court, in exercising that constitutional power, may, in determining the rights of the parties, construe the rules of the proceedings of the Senate in order to determine whether the Senate has exceeded its constitutional or statutory powers.

In the proceeding now before the court, which concerns entirely the power and authority of a committee to act for the Senate, the Senate may or may not agree with the conclusions of the Court. If it does, it will not be because it is bound by the judgment of the court, but because of its constitutional right to determine under its rules of proceedings whether or not the committee it once authorized to act for it, has continuing power to act under that authority. When a court assumes to give its judgment as such, it must be in the exercise of judicial functions and powers which are reposed solely in the court as part of the judicial branch of the government and which will be effective and final, subject only to review by a higher court and not subject to be rendered ineffective through the exercise of powers conferred by the Constitution upon either the executive or legislative branch of the government. It is not, therefore, within the power of the Congress to confer upon the District Courts jurisdiction to determine the authority of a committee claiming to act under authority of the power of the Senate through Section 24 of the Judicial Code, under which the petitioners assert that this court has jurisdiction.

In Hayburns Case, 2 Dall. 409, cited and followed in Muskrat v. United States, 219 U. S. 346, the court unanimously agreed:

> "That by the Constitution of the United States, the government thereof is divided into three distinct and undivided branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit Courts, by this Act, are not of that description, and that the act does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this Court."

See also United States v. Ferreira, 13 How. 40; Gordon v. United States, 117 U. S. 697; In re Sanborn, 148 U. S. 222.

In the case of Muskrat v. United States, the court commented upon the Ferreira case as follows:

"In the Ferriera case this court determined the effect of proceedings under an act of Congress, authorizing the District Judge of the United States for the Northern District of Florida to receive and adjudicate claims for losses for which this government was responsible under the Treaty of 1819 between the United States and Spain; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty, was to pay the amount thereof. It was held that the award of the District Judge under that Act was not the judgment of a court and did not afford a basis of appeal to this court."

In Ex Parte Gans, 17 Fed. 471, a petition was filed under the Act of June 22, 1874, providing for the determination by the court of the value of the services

of an informer in smuggling cases. Section 6 of the Act provided:

> "That no payment, where judicial proceedings shall have been instituted, shall be made to the informer until the compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services been duly certified by said court or judge for the information of the secretary of the treasury; but no certificate of the value of such services shall be conclusive of the amount thereof."

Judge Treat said:

> "As Section 4 gives to the secretary of the treasury the sole discretion as to the sum to be awarded to an informer, it is obvious that no judicial action can properly be had with respect thereto; for when a judicial decision is had, it must be final, unless reversed or modified by the appropriate court having appellate or revisory jurisdiction. There is no appeal from a decree of the court to any executive officer nor can there be consistently with the elementary principles on which the government rests. The co-ordinate authority of the executive, legislative and judicial departments must be observed; each of which departments is confined in its action to the sphere assigned to it."

See also, following and approving the Gans case, Ex Parte Riebeling, 70 Fed. 310; also the opinion of Judge McPherson of this court in United States v. Queen, 105 Fed. 269.

Inasmuch as the case of the petitioners is based upon the determination of the authority conferred upon them by the Senate of the United States under the rules of its proceedings and the determination of that question is, under the Constitution, conferred upon the Senate alone, my conclusion is that the case depends

upon the determination, not of a judicial, but of a legislative question; that no finding by this court that the Senate has continued under its proceedings the life of the Committee authorized by Senate Resolutions 195 and 324 beyond the end of the Session of the 69th Congress, would be final, and, therefore, a decree, based thereon, would not be a decree which would be final, unless modified or reversed by a court having appellate jurisdiction, but would be subject to the determination of the Senate of the rules of its proceedings. It follows that Section 24 of the Judicial Code cannot be constitutionally construed as having conferred that power upon the court, as claimed by the petitioners.

It is, therefore, ordered that the bill be dismissed for want of jurisdiction.

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**DECREE.**

(Filed July 29, 1927.)

This cause came on to be heard at this term, and was heard upon petition and answers and upon the evidence submitted by the several parties to the record, and upon admissions and stipulations of record, and was argued by counsel and briefs submitted: thereupon, this 29th day of July, 1927, on consideration thereof, it is ordered, adjudged and decreed that complainant's petition be dismissed for want of jurisdiction.

J. W. THOMPSON,
*J.*

## PETITION FOR APPEAL.

(Filed July 29, 1927.)

*To the Honorable J. Whitaker Thompson, United States District Judge for the Eastern District of Pennsylvania:*

The above named petitioners, feeling aggrieved by the decree entered in the above entitled cause on the day of July, 1927, do hereby appeal from said decree to the Circuit Court of Appeals for the Third Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of such court in such cases made and provided.

And this appeal being taken by the United States through a Committee of the United States Senate acting for and in behalf of the United States Senate, a coordinate branch of the Government of the United States, it is prayed that no bond, obligation, or security be required from your petitioners, either to prosecute the suit or to answer in damages or costs.

JERRY C. SOUTH,
*Attorney and Special Agent for the Petitioners.*

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## ORDER ALLOWING APPEAL

(Filed July 29, 1927.)

July 27, 1927. Appeal allowed. Bond in $250.00.

J. W. THOMPSON,
*J.*

## ASSIGNMENT OF ERRORS.

(Filed July 29, 1927.)

Now come the petitioners, by their attorney, in the above entitled cause and say that in the decree entered therein on the day of July, 1927, error was committed against the just rights of the petitioners, and assign the following errors:

First: That the Court erred in holding that the case depends upon the determination of a legislative and not a judicial question.

Second: That the Court erred in not holding that the petitioners, James A. Reed, Charles L. McNary, William H. King, and Robert M. LaFollette, Jr., constitute a Special Senate Committee continuing in existence and authorized to act subsequent to the expiration of the 69th Congress.

Third: That the Court erred in not holding that the case is a civil suit in equity brought by the United States or officers thereof authorized by law to sue.

Fourth: That the Court erred in not holding that the case is a civil suit in equity brought against local State officers to enforce the performance of an official duty imposed by law and requiring no exercise of discretion.

Fifth: That the Court erred in decreeing that it had no jurisdiction of the case and that the bill of complaint of the petitioners be dismissed.

Sixth: That the Court erred in not decreeing the right of the petitioners to obtain possession under appropriate order of the Court of such ballot boxes, bal-

lots, and other election paraphernalia set forth in the bill of complaint, as will enable the petitioners to carry out the separate constitutional powers granted to the United States Senate by the Constitution of the United States.

JERRY C. SOUTH,
*Attorney and Special Agent for the Petitioners.*

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## PRÆCIPE FOR TRANSCRIPT OF RECORD.

(Filed July 29, 1927.)

*To the Clerk of said Court:*

Please prepare and certify transcript of record in the above entitled cause for filing in the United States Circuit Court of Appeals for the Third Circuit, including therein the following:

1. Docket entries.

2. Petition or bill of complaint.

3. Process served respondents.

4. Motion to dismiss.

5. Answers.

6. All that part of stenographers' transcript showing admissions, agreements, and stipulations of counsel in presence of the Court.

7. Order of Court entered June 22, 1927, calling upon parties to file such documentary evidence as they might desire to have considered as evidence in the case.

8. All papers, documents, and resolutions authenticated by the Secretary of the United States Senate submitted by the respective parties in pursuance of such order.

9. Opinion of the Court.

10. Decree of Court.

11. Petition for appeal and order of allowance.

12. Assignment of errors.

13. Citation.

14. This præcipe and proof of service thereof.

15. Clerk's certificate.

16. All orders and decrees of the Court not hereinbefore specified.

JERRY C. SOUTH,
*Attorney and Special Agent for the Petitioners-Appellants.*

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**PETITION FOR TEMPORARY RESTRAINING ORDER.**

(Filed July 29, 1927.)

*To the Honorable J. Whitaker Thompson, United States District Judge for the Eastern District of Pennsylvania:*

The bill of complaint of petitioners in the above entitled cause having been dismissed for want of jurisdiction by the decree entered on the day of July, 1927, and your petitioners having in accordance with law petitioned your Honor for allowance of an appeal from said decree to the Circuit Court of Appeals for the Third Circuit, your petitioners respectfully show as follows:

1. That your petitioners are advised and believe that pursuant to the rules of said Circuit Court of Ap-

peals for the Third Circuit no term of said court will be held prior to the first Monday of October in the year 1927.

2. That your petitioners are advised and believe that, under and in pursuance of a certain provision of the statutes of the Commonwealth of Pennsylvania relating to the time of holding primary elections, to wit:

> "The said primaries shall be held on the third Tuesday of September in all odd-numbered years, and on the third Tuesday of May in all even-numbered years, except in the year of the nomination of a President of the United States, in which year the primary shall be held on the fourth Tuesday of April." (Pamphlet Laws 1923, 256.)

a primary election will be held in Delaware County, Pennsylvania, on the third Tuesday of September, 1927.

3. That your petitioners are advised and believe that, under color of a certain provision of the statutes of the Commonwealth of Pennsyvlania, to wit:

> "Whenever the election officers of any election district shall require the election boxes of such district, to hold any election which by law they are or shall be required to hold, they shall keep the same securely in their possession, without opening, until the morning of such election, and until they shall severally be sworn or affirmed not to disclose how any elector shall have voted, and, after being so sworn or affirmed, they shall open the said boxes, and burn and totally destroy all the ballots and other papers which they shall find therein, before proceeding to hold such election." (Pamphlet Laws 1925, 103, 106.)

certain of the subject matter of this cause, namely, the contents of the ballot boxes involved in this cause, consisting of ballots cast in the election held in Delaware

County, Pennsylvania, on the 2nd day of November, 1926, and other papers used in connection with said election, will be burned and totally destroyed on the morning of the third Tuesday of September, 1927.

3(a). That the destruction of the contents or any part of the contents of the ballot boxes now legally or otherwise in possession of the defendants herein, under color of authority of above set out statutes of the State of Pennsylvania would be in effect to deprive the United States Senate of its right to the possession of the ballots and other election papers contained in said ballot boxes, and is repugnant to and in conflict with the authority and rights conferred upon the United States Senate, by Article I, Paragraph 5, of the Constitution of the United States, and is, therefore, void and of no legal effect.

4. That the destruction of said ballots and other papers will result in great and irreparable loss and damage to your petitioners, and will render the appellate jurisdiction of the said Circuit Court of Appeals for the Third Circuit nugatory, and that your petitioners have no other adequate remedy to preserve the subject matter of this cause pending the appeal for which petition has been filed as aforesaid.

Wherefore, to the end that justice may be done and that your petitioners may prosecute said appeal in accordance with law, and inasmuch as your petitioners have no other adequate remedy, they pray:

1. That ancillary to the allowance of said appeal appropriate orders may issue restraining, pending said appeal, the respondents, and each of them, their and each of their officers, agents and servants, and any other persons having possession thereof, from delivering any of the contents of said ballot boxes to said elec-

tion officers, and restraining, pending said appeal, the respondents and said election officers, and each of them, their and each of their officers, agents and servants, and any other persons having possession thereof, from burning or destroying any of the contents of said ballot boxes, and restraining all and each of the persons aforesaid from in any manner removing any of the contents of said ballot boxes from the jurisdiction of this Honorable Court or said Circuit Court of Appeals for the Third Circuit.

2. That a proper and suitable person may be appointed to receive, collect, and take possession of the contents of all of said ballot boxes whether in the possession of said respondents, or of any other person acting in respondents' behalf; with authority to receive and hold the same, pending the determination of said appeal, until further order of this Court, or of said Circuit Court of Appeals for the Third Circuit.

3. That your petitioners may have such other and further relief in the premises, as the nature of the case may require and to your Honor shall seem meet.

JERRY C. SOUTH,
*Attorney and Special Agent for the Petitioners-Appellants.*

---

**ORDER DIRECTING THAT RESTRAINING ORDER ISSUE.**

(Filed July 29, 1927.)

July 29, 1927. Let restraining order issue as prayed for in paragraph 1, of prayers for relief of above petition.

J. W. THOMPSON,
*J.*

## RESTRAINING ORDER.

(Filed July 29, 1927.)

Before THOMPSON, *J.*

And now, this 29th day of July, A. D. 1927. upon consideration of the petition for appeal filed by the plaintiffs in the above entitled case, it is

Ordered and decreed that the County Commissioners of Delaware County, Pa., the Prothonotary of Delaware County, Pa., John J. Saling, justice of the peace in and for Delaware County, Pa., and all other justices of the peace and aldermen of cities of Delaware County, Pa., having custody of ballot boxes used at the general election held in Delaware County on November 2nd, 1926, be and the same are hereby enjoined and restrained pending said appeal as are each of them, their and each of their officers, agents, attorneys and servants, and any other person having possession thereof, from delivering any of the contents of said ballot boxes to any of the election officers of Delaware County, Pa., or to any other person whatsoever until the further order of this Court:

It is further ordered and decreed that the said County Commissioners of Delaware County, Pa., the prothonotary of Delaware County, Pa., John J. Saling, a justice of the peace in and for Delaware County, Pa., and all other justices of the peace and aldermen of cities of Delaware County, Pa., and the election officers of Delaware County, Pa., and each of them, their and each of their officers, agents, attorneys and servants, having custody of ballot boxes used at the general election held in Delaware County on November 2nd, 1926, and any other person having possession of said ballot boxes, be and the same are hereby enjoined and re-

strained from burning or destroying any of the contents of said ballot boxes, and from in any manner removing any of the contents of said ballot boxes from the jurisdiction of this Court or from the jurisdiction of the Circuit Court of Appeals for the Third Circuit pending said appeal.

By THE COURT:

Attest:

LEO A. REILLY,
*Deputy Clerk*

## CLERK'S CERTIFICATE.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA.

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of James A. Reed, *et al.*, constituting a Special Committee of the United States Senate, and Jerry C. South, Attorney, etc., v. The County Commissioners of Delaware County, Pennsylvania, *et al.*, in equity No. 4017, March term, 1927, as per præcipe filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include

now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia,

(Seal) this 19th day of August, in the year of our Lord one thousand nine hundred and twenty-seven and in the one hundred and fifty-second year of the Independence of the United States.

GEORGE BRODBECK,
*Clerk.*

## APPENDIX.

May 18th, 1927

Mr. Jerry South,
Hibbs Building,
Washington, D. C.

My dear Mr. South:

I told you over the 'phone today that I would get my brief off today. I am sorry to have to state that it will not go out in tonight's mail. I have completed it, however, and it is being typed. I promise you to mail it tomorrow. I will want you to agree to the following facts or I will want to offer evidence in support of them.

(1) That Mr. Wilson's petition contesting Mr. Vare's election was first presented on January 8th, 1927.

(2) That following the presentation of Mr. Reed's resolution #364 to continue the Reed Committee, a filibuster ensued which lasted until the adjournment of the Senate and the expiration of the 69th Congress on March 4th, 1927, and that the filibuster prevented the passing of some very important legislation.

(3) Mr. Robinson again presented the petition of Mr. Wilson contesting Mr. Vare's election on March 4th, 1927, and requested that it be received, printed in the record and referred to the committee on privileges and elections, whereupon the Vice-President announced that "without objections the petition will be received, printed in the record and referred to the Committee on privileges and elections."

(4) That Senator Goff resigned from the Reed Committee on March 26th, 1927.

(5) That on April 7th, 1927, the Vice-President Dawes appointed Senator Fess on the committee to fill the vacancy caused by Senator Goff's resignation.

(6) That Senator Fess declined the appointment assigning as one reason that in his opinion the Committee expired with the 69th Congress and is not in force.

(7) From the 51st Congress to the 62nd Congress inclusive the Senate by a resolution adopted shortly prior to the expiration of each Congress, continued all standing and select committees until the commencement of the first regular session of the Senate in the next Congress. The practice of so continuing all its select committees ceased with the 62nd Congress and has never been resumed, but was continued with respect to standing committees until and including the 65th Congress. In the 66th Congress (1921) the Senate's rules were amended to continue its standing committees in force after the expiration of Congress and until the appointment of their successors at the commencement of the next Congress.

(8) No committee of the Senate can collect for traveling or other expenses incident to sitting away from Washington unless authorized to sit elsewhere.

(9) Section 1 of Rule V of the Rules of the Senate provides:

"No Senator shall absent himself from the service of the Senate without leave."

I do not think there can be any question about these facts or I would not ask you to agree to them. I would appreciate it if you would write me a letter stating that you do agree to them without argument or comment. I am willing that you agree to them subject to their relevancy. I ask this that we may have it clear cut of record that the facts are admitted without qualifications.

Yours very truly,

ALBERT J. WILLIAMS.

P. S. I also ask you to agree that I may put in evidence if desired, the statement of Senator Reed, which was published commenting on the appointment of Senator Fess, and expressing the opinion that the Reed Committee is not in force; also the statement which was given out by Senator Fess when he declined appointment

A. J. W.

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UNITED STATES SENATE,

WASHINGTON, D. C.

May 26th, 1927

Albert J. Williams, Esq.
Attorney-at-law,
Media, Penna.

Dear Sir:

This is a reply to your letter of the 18th instant, addressed to Mr. South. You state that you desire the Petitioners in re Investigation by the United States Senate of the General Election held November 2, 1926, at which a Senator for the State of Pennsylvania was elected in the United States District Court for the

Eastern District of Pennsylvania, to agree that certain statements contained in your letter are true; and you state that if your proposition is not agreed to you will want to offer evidence in support of such statements.

It is our opinion that none of the matters or statement of facts which you have classified in your letter under nine heads are material or relevant to any issue involved in the case. We are willing to concede that some of the statements contained in the nine subdivisions are correct, but as stated, we regard them as wholly immaterial and irrelevant, and object to them being received as evidence or considered by the Court in the case.

In order to avoid putting you to the trouble of making formal proof, we admit that subdivisions, 2, 4, 5 and 9 correctly state the facts. These subdivisions, as set forth in your letter are as follows:

> "2. That following the presentation of Mr. Reed's resolution #364 to continue the Reed Committee, a filibuster ensued which lasted until the adjournment of the Senate and the expiration of the 69th Congress on March 4th, 1927 and that the filibuster prevented the passing of some very important legislation.
>
> "4. That Senator Goff resigned from the Reed Committee on March 26th, 1927.
>
> "5. That on April 7th, 1927, the Vice-president Dawes appointed Senator Fess on the Committee to fill the vacancy caused by Senator Goff's resignation.
>
> "9. Section 1 of Rule V of the Rules of the Senate provides: 'No Senator shall absent himself from the service of the Senate without leave.' "

The statement contained in sub-division No. 1 namely:

> "That Mr. Wilson's petition contesting Mr. Vare's election was first presented on January 8th, 1927,"

is not correct. A petition was presented on January 8th, 1927, by Mr. Wilson asking the impounding of the ballot boxes and the election paraphernalia. We are willing to make admission of this fact to avoid putting you to the trouble of formal proof.

Your statement under sub-division 3 is inaccurate.

We are willing to admit that it is a fact that on March 4th, 1927, Senator Robinson presented the petition of Mr. Wilson contesting Mr. Vare's election, and requested that it be received, printed in the Record and referred to the Committee on Privileges and Elections. Whereupon, the Vice-President announced that:

> "Without objection, the petition will be received, printed in the Record and referred to the Committee on Privileges and Elections."

With respect to your sub-division 6, we are willing to admit that Senator Fess declined the appointment and that he issued a statement declaring in substance that in his opinion the Committee expired with the 69th Congress. We have no knowledge of what communication he made to the Vice-President or what reasons he assigned for not accepting the appointment to fill the vacancy caused by the resignation of Senator Goff.

The statements contained in your sub-division 7 are substantially correct but after a thorough search of the Records we find the facts with respect to standing, special and select committees to be as stated in our reply brief. We believe that our reply brief will meet your wishes and requirements in the matter.

With respect to your sub-division 8, in which you ask us to admit that

> "No committee of the Senate can collect for traveling or other expenses incident to sitting away from Washington unless authorized to sit elsewhere,"

is a conclusion of law and not a statement of fact. We therefore do not feel like acceding to your request.

We are prompted to state however that in our opinion it is wholly immaterial whether a Committee of the Senate can collect expenses under any circumstances. It is quite likely that Senators would be authorized to collect their necessary expenses, whether in Washington or outside of Washington, only when in the discharge of some duty devolved upon them by law or by action of the Senate.

You ask permission to put in evidence, if desired, a statement attributed to Senator Reed of Pennsylvania, which you state was published, and was a comment on the appointment of Senator Fess; also a statement which was given out by Senator Reed of Pennsylvania when Senator Fess declined the appointment. It occurs to us that neither of these statements is competent or relevant. The brief which you filed with the Court contains what you claim are the statements made by the two Senators mentioned.

In the argument made by Mr. South to the Court, he read statements made by Senators Borah, Walsh, Norris and Goff in which they expounded their views with respect to the power of the Committee and declared that the Committee was still in existence and competent to function. The statements were filed with the Clerk and will receive such consideration as the Court feels they are entitled to. I suppose the Court will examine your brief and will give to the statements of Senator Reed and Fess such consideration as he feels they are entitled to.

If you are satisfied with the admissions we are willing to make as herein expressed, you are at liberty to file this letter with the Court. Of course, it is to be understood that objection is made by petitioners to the admission as evidence of any of the matters herein conceded to be correct statements of facts, upon the ground that the facts so stated are wholly immaterial and irrelevant.

Please advise us what your decision is with respect to the matters herein stated and whether this letter will be filed with the Court.

Very truly yours,

JERRY C. SOUTH,
WILLIAM H. KING.

---

June 2nd, 1927.

Hon. William H. King,
U. S. Senate,
Washington, D. C.

Dear Senator:

In re Jerry South v. County Commissioners—I am in receipt of your letter of May 26th in reply to my letter of May 18th addressed to Mr. South in which I asked him to admit certain facts. I have sent your letter to Judge Thompson with a copy of this letter. Your letter is satisfactory except that you do not admit the 7th statement in my letter to Mr. South, which is as follows:

> "From the 51st Congress to the 62nd Congress inclusive the Senate by a resolution adopted shortly prior to the expiration of each Congress, continued all standing and select committees until the commencement of the first regular session of the Senate in the next Congress. The practice of so continuing all its select committees ceased with

the 62nd Congress and has never been resumed, but was continued with respect to standing committees until and including the 65th Congress. In the 66th Congress (1921) the Senate's rules were amended to continue its standing committees in force after the expiration of Congress and until the appointment of their successors at the commencement of the next Congress."

I think this should be admitted. You virtually admit it in your briefs, but they will not be a part of the record. If you will not admit this request I would like to prove the several resolutions and the amendment to the Senate rules.

I am enclosing herewith a copy of my letter to Judge Thompson.

Yours truly,

ALBERT J. WILLIAMS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

October Term, 1927. No. 3684 (List No. 17).

JAMES A. REED, *et al.*,
*Appellants,*

*v.*

COMMISSIONERS OF DELAWARE COUNTY, *et al.*,
*Appellees.*

And afterwards, to wit, on the thirteenth day of October, 1927, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the ninth day of November, 1927, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

## OPINION PER CURIAM.

(Filed November 8, 1927.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

October Term, 1927. No. 3684.

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. KING, ROBERT M. LAFOLLETTE, JR., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and JERRY C. SOUTH, Attorney and Representative of the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress,

*Appellants,*

*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, and JOHN J. SAILING, a Justice of the Peace in and for Delaware County, and ALL OTHER JUSTICES OF THE PEACE AND ALDERMEN OF CITIES OF DELAWARE COUNTY, PENNSYLVANIA, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926,

*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

*Per Curiam.*

And now, November 8, 1927, after argument and due consideration had, the decree below is affirmed on the ground of the lack of jurisdiction in that court, as stated in its opinion.

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## ORDER AFFIRMING DECREE.

(Filed November 8, 1927.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

October Term, 1927. No. 3684.

JAMES A. REED, *et al.*,
*Appellants,*

*v.*

COUNTY COMMISSIONERS OF DELAWARE COUNTY, *et al.*,
*Appellees.*

---

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

Philadelphia,
November 8, 1927.

PER CURIAM,
BUFFINGTON,
*Circuit Judge.*

## CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA,
THIRD JUDICIAL CIRCUIT, } *Sct.:*

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of James A. Reed, *et al.*, appellants, v. County Commissioners of Delaware County, *et al.*, appellees, No. 3684, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this
(Seal) twenty-eighth day of December, in the year of our Lord one thousand nine hundred and twenty-seven and of the Independence of the United States the one hundred and fifty-second.

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 12, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
FEB 4 1928
CHARLES ELMORE CROPL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

No. 744

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. KING, ROBERT M. LAFOLLETTE, JR., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and JERRY C. SOUTH, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, *Petitioners*,

*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, and JOHN J. SALING, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, *Respondents*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAMES A. REED, Petitioner, *Pro se*, and Chairman of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, *for the Committee*.

JERRY C. SOUTH, Petitioner, *Pro se, and attorney-in-fact and representative of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress*.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

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No. ———

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JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. KING, ROBERT M. LAFOLLETTE, JR., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and JERRY C. SOUTH, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, *Petitioners*,

*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, and JOHN J. SAILING, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, *Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

---

The petitioners, James A. Reed, Charles L. McNary, William H. King, Robert M. LaFollette, Jr., and Jerry

C. South, pray that writ of certiorari issue in accordance with the provisions of section 240(a) of the Judicial Code, as amended, (43 Stat. 938) to review the order of the United States Circuit Court of Appeals for the Third Circuit entered on November 8, 1927, in the above entitled case affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania entered July 29, 1927, dismissing the case for want of jurisdiction.

**Statement of the Case.**

Upon May 19, 1926, and January 11, 1927, Senate Resolution 195, 69th Congress, 1st Session, and Senate Resolution 324, 69th Congress, 2nd Session, respectively, were adopted by the United States Senate. The resolutions created and empowered a special select committee of five members of the Senate.

Senate Resolution 195 authorized the committee to investigate expenditures, and agreements for appointment or election to office, made to influence the nomination of any person as a candidate for membership in the United States Senate at the general election held in November, 1926. The committee was empowered to sit and act at such time or times and at such place or places as it might deem necessary, to require by subpoena or otherwise the attendance of witnesses and the production of books, papers, and documents, and to do such other acts as might be necessary in the matter of the investigation.

Senate Resolution 324 after referring in the preamble to charges of fraudulent and unlawful practices made in connection with the nomination and the alleged election of William S. Vare as Senator from Pennsylvania at the election of November 2, 1926, fur-

ther authorized the special select committee to take possession of ballots and other election paraphernalia used in the election and to take and preserve all evidence of fraud and other irregularities affecting the result of the election. The Resolution invested the committee, in connection with the execution of such additional authority, with all powers of procedure that the committee possessed under Senate Resolution 195. Senate Resolution 324 also directed the Sergeant-at-Arms to attend and execute the directions of the committee and empowered the special select committee to act through a subcommittee of one or more of its members.

The petitioners, James A. Reed, Charles L. McNary, William H. King and Robert M. LaFollette, Jr., together with Senator Guy D. Goff of West Virginia, were appointed as members of the special committee. Senator Goff subsequently resigned because of absence from the country due to ill health. (R. 42.)

Upon February 21, 1927, the petitioner, James A. Reed, introduced Senate Resolution 364, 69th Congress, 2d session, the text of which at the time of introduction read as follows (68th Cong. Rec. 4307):

> *Resolved,* That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the Seventieth Congress.
>
> That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are

now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

*Resolved further,* That the general authority of the said special committee is hereby extended to cover the nomination and election of any Senator at any general election held during the year 1926.

As thus introduced the resolution applied to senatorial elections in other States as well as in Pennsylvania. Subsequently, on March 2, 1927, the petitioner, James A. Reed, under the rules of the Senate, modified the resolution (68th Cong. Rec. 5293) so as to confine its scope to the senatorial election in Pennsylvania. As thus modified the text of the resolution was as follows:

*Resolved,* That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion, and/or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

On March 4, 1927, the petition of contest of William B. Wilson against William S. Vare was received by the Senate and referred to the Committee on Privileges and Elections. (R. 14 and 38-41; 68th Cong. Rec. 5895.)

The Sixty-ninth Congress expired *sine die* March 4, 1927, without final action being taken on Senate Resolution 364 (R. 37-8) or the petition of contest.

The petitioner, James A. Reed of Missouri, chairman of the special select committee, on March 5th, requested the opinions of Senators William E. Borah of Idaho, chairman of the Committee on Foreign Relations, George W. Norris of Nebraska, chairman of the Committee on the Judiciary, and Guy D. Goff of West Virginia, then a member of the special select committee, as to the power of the committee to proceed during the recess of the Senate. The opinions were given and were all favorable to the power of the committee. (R. 51-62.)

Thereafter the special select committee demanded that the Sergeant at Arms of the Senate act for and carry out the orders of the committee in pursuance of Senate Resolution 324 and take possession of certain ballot boxes and other election paraphernalia used in the general election in the State of Pennsylvania on November 2, 1926, at which ballots were cast for an United States Senator. The Sergeant at Arms failed and refused to act for and carry out the orders of the committee. (R. 44.) The committee thereupon authorized and directed the petitioner, Jerry C. South, to act as its attorney and representative and directed him to take possession of the ballot boxes and other election paraphernalia. (R. 32.)

Senator Henry W. Keyes of New Hampshire, chair-

man of the Committee to Audit and Control the Contingent Expenses of the Senate, refused to approve vouchers for the payment of the expenses of the special select committee out of the contingent funds of the Senate as authorized by Senate Resolutions 227 and 258 of the Sixty-ninth Congress, first session, and 324 of the 69th Congress, second session. (R. 43-5.)

The petitioner, Jerry C. South, in pursuance of the authority conferred on him, demanded that the respondents, the County Commissioners of Delaware County, Pennsylvania, the Prothonotary of that county, and John J. Sailing, a justice of the peace of that county, deliver into the petitioner's possession all ballot boxes and their contents, ballots, return sheets, tally sheets, voters' lists, voters' check lists, ballot check lists, registration lists, and other election paraphernalia in the custody of the respondents. The respondents failed and refused to comply with this demand and continue to do so.

In consequence of the refusal the special select committee directed that the petition in the present cause be filed and the petitioners, William H. King and Robert M. LaFollette, Jr., together with the petitioner, Jerry C. South, personally appeared before the Court and the attorneys of the respondents and renewed the demand. (R. 33 and 49-50.) The petition was dismissed by the District Court for want of jurisdiction. (R. 166.) A further petition for appeal to the Circuit Court of Appeals for the Third Circuit was filed with and allowed by the District Court (R. 167) and a petition for temporary restraining order preserving the subject-matter of the litigation from destruction and from removal from the jurisdiction of the District Court or the Circuit Court of Appeals until further order of the

District Court, was granted by the District Court. (R. 170-5.)

On November 8, 1927, the Circuit Court of Appeals by a *per curiam* opinion affirmed the decree of the lower court dismissing the petition for lack of jurisdiction and adopted the opinion of the lower court (R. 186-7).

## Questions Presented.

The questions for determination in this case are:

(1) Whether there is presented a case or controversy of which the Federal courts may under the Constitution be vested by the Congress with jurisdiction to determine, and

(2) If so, whether the Federal courts have by Act of Congress been so vested with jurisdiction, and more particularly—

(a) Whether the case constitutes a suit of a civil nature in equity.

(b) Whether it is brought by the United States.

(c) Whether the petitioners are officers of the United States.

(d) Whether the petitioners have been authorized by law to bring suit.

(e) Whether the suit is against local officers of the State of Pennsylvania to compel the performance of a ministerial duty imposed upon them by law and is not a suit against the State.

**Reasons for Granting the Petition.**

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Certain Senators claim to act as a special select committee of the Senate empowered under resolutions of the Senate and asserting a right under such resolutions and other law to obtain the aid of a Federal court in the execution of their powers of inquiry under such resolutions. They ask for a mandatory injunction requiring local State officers to deliver possession of certain ballot boxes and other election paraphernalia. Whether such a situation presents a case or controversy jurisdiction of which has been conferred on the District Courts, is a question that should be, but has never been, expressly settled by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way which in the opinion of the petitioners is in conflict with the applicable decisions of this Court. The decision that the Federal courts may not determine the authority of a special select committee of the Senate under resolutions of the Senate empowering that committee, for the reason that such determination involves a legislative and not a judicial question, is a determination contrary to the decision of this Court in *McGrain v. Daugherty* (1927), 273 U. S. 135.

3. The Circuit Court of Appeals has rendered a decision that results in denying the coordinate Legislative branch of the Government the right through its own agencies to resort to the Judicial branch of the Government for aid in executing the separate constitutional powers of the Senate. Peaceable resort to the Court by the Executive branch of the Government in

carrying out its executive duty of enforcing the law in lieu of resort to military force has been commended by this Court. *In re Debs* (1895), 158 U. S. 564, 583. An agency of the Senate has in this case also sought to resort to the Federal courts in lieu of resorting to force through special deputies. The public interest demands that the Legislative branch of the Government may function without obstruction and delay in judging the qualifications of its members and in legislating upon the manner of holding senatorial elections, and also in exercising in connection therewith its auxiliary powers of inquiry. The interests of all citizens of the United States in Pennsylvania or elsewhere demand that the Federal Government in its capacity as *parens patriae* protect them from injury arising from the improper conduct of senatorial elections and secure to them their right of being represented by United States senators of their choice. Unless the right of the Senate to resort to the courts in the exercise of its auxiliary powers of inquiry in connection with the above phases of the public interest, is finally adjudicated by this Court, it will continue to be possible for other lower courts to follow the precedent made by the lower courts in this case, and permit local State officials to obstruct and delay the exercise of such powers. The questions involved in the decision of the lower courts in this case, as well as the questions which the court by reason of the dismissal of the cause for lack of jurisdiction held it unnecessary to decide, and did not decide, are of such importance to the proper exercise by the Senate of the United States of its separate constitutional powers, that the petitioners, as a committee of the Senate, deem it their duty to present, for the first time in the history of this Government, on behalf of the

Senate and in pursuance of the powers vested in them by the Senate, a petition to this Court for writ of certiorari in order to maintain and preserve the coordinate authority of the Senate and the Legislative branch of the Government.

JAMES A. REED, Petitioner, *Pro se*, and Chairman of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, *for the Committee.*

JERRY C. SOUTH, Petitioner, *Pro se, and attorney-in-fact and representative of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress.*

## BRIEF IN SUPPORT OF THE PETITION.

### Opinions in the Courts Below.

The opinion of the District Court of the United States for the Eastern district of Pennsylvania in this case was a written opinion rendered upon the decree dismissing the bill of complaint for want of jurisdiction. This opinion will be found on page 145 of the Record and in 21 Fed. (2d) 144. The opinion of the United States Circuit Court of Appeals for the Third Circuit was a *per curiam* opinion which merely stated that the decree below was affirmed on the ground of lack of jurisdiction of the lower court as stated in its opinion. It will be found on page 187 of the Record, but has not yet been published in the Federal Reporter.

### Grounds of the Jurisdiction of This Court.

The decree of the District Court of the United States for the Eastern District of Pennsylvania was entered in this cause July 29, 1927 (R. 166). From this decree appeals were prosecuted to the United States Circuit Court of Appeals for the Third Circuit under the provisions of section 128 of the Judicial Code (33 Stat. 1133). The Circuit Court of Appeals affirmed the decree of the District Court on November 8, 1927 (R. 187).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended (43 Stat. 938).

### Statement of the Case.

The Court is respectfully referred to the statement of the case contained in the petition for writ of certiorari (p. 2), where all the facts material to this case are stated.

**Specification of Assigned Errors to be Urged.**

The assigned errors which will be urged in this case are as follows:

(1) The holding that the case depends upon the determination of a legislative and not a judicial question.

(2) The decreeing that the District Court had no jurisdiction of the case and that the bill of complaint of the petitioners be dismissed.

(3) The failure to decree the right of petitioners to obtain possession under appropriate court orders of such ballot boxes, ballots, and other election paraphernalia set forth in the bill of complaint as will enable the petitioners to carry out the separate constitutional powers granted to the United States Senate by the Constitution of the United States.

(4) The failure to hold that the petitioners, James A. Reed, Charles L. McNary, William H. King, and Robert M. LaFollette, Jr., constitute a special Senate committee continuing in existence and authorized to act subsequent to the expiration of the 69th Congress.

(5) The failure to hold that the case is a civil suit in equity brought by the United States or officers thereof authorized by law to sue.

(6) The failure to hold that the case is a civil suit in equity brought against local State officers to compel the performance of an official duty imposed by law and requiring no exercise of discretion.

## ARGUMENT.

### I. The Present Cause Presents a Controversy Which Requires the Exercise by the Courts of the Judicial Power of the United States.

The District Court dismissed the petition upon the ground that the cause presented for determination could not result in a judgment, the rendition of which would be the exercise of judicial powers. The point was not raised or argued by counsel for either petitioners or respondents before that Court. The Court came to this conclusion by the following steps: the Constitution vests in the Senate the determination of the rules of its proceedings (R. 161); the regulation of the mode and manner of procedure of its committees is a part of the determination of the rules of proceedings (R. 161-2); this determination is exclusively for the Senate except that "in cases or controversies such, for instance, as habeas corpus proceedings," a court may construe the rules of proceedings of the Senate (R. 162-3); the Senate would not be bound by a judgment of the court in the instant case, "because of its constitutional right to determine under its rules of proceedings whether or not the committee it once authorized to act for it, has continuing power to act under that authority" (R. 163).

Therefore, according to the District Court, the construction of a Senate resolution is a legislative matter, but not necessarily beyond the constitutional power of the courts. The District Court admits that in some instances a court may construe such resolutions. One such instance the District Court finds in *McGrain v. Daugherty* (1927), 273 U. S. 135. The District Court's interpretation of this case is that a justiciable matter

is presented because the case had to do with a writ of *habeas corpus* which is expressly mentioned in the Constitution, and that the substantial distinction between the present case and the Daugherty case rests on this basis of *habeas corpus*. It is submitted that the District Court, in its interpretation of the Daugherty case, imputes to that case a doctrine of jurisdictional limitation which the case itself does not justify—a doctrine that limits the constitutional power of federal courts to construe the legal effect of Senate resolutions to those cases involving proceedings named in the Constitution. The Supreme Court itself did not put the Daughtery case on any such doctrine. The District Court did not suggest, and the petitioners are unable to find, any basis for such a doctrine. Constitutional rights are not so restricted. Implications are permissible. Judicial relief may be sought not only in accordance with a proceeding mentioned in the Constitution, such as *habeas corpus,* but also in any other recognized judicial proceeding, such as a suit for equitable relief as in the present case. Indeed, the District Court assumes that there are "other cases" besides *habeas corpus* (R. 159) where courts may construe Senate resolutions, but denies that this case is one of them. Therein is involved the underlying question now presented for decision: Whether a Federal court constitutionally *can have* jurisdiction to determine whether the petitioners or respondents are entitled to the present possession of the ballot boxes and other election paraphernalia.

It is submitted that this is a proper matter for judicial determination, that it is a "case" or "controversy" within the meaning of the Constitution.

In the first place, there is no want of adverse parties

to create a controversy and there is a real conflict between the claims of these parties. Each side claims to be entitled to the present possession of certain subject matter, the ballot boxes. The claims are presented in an established and well recognized form of proceeding, a suit in equity. If the position of the parties were reversed—that is to say, if the members of the Senate committee had actually seized the ballot boxes and the present defendants had instituted appropriate proceedings against them for so doing and the members of the committee attempted to justify their action by virtue of the authority conferred by the Senate,—it would seem that there would be present a matter appropriate for court action.

In the next place, this conflict of claims between the adversary parties raises a question of law, namely, what is the proper interpretation of the Senate resolutions in respect of the existence and power of the special select committee. The District Court, in holding that this is a legislative and not a judicial function, has confused the *power to adopt resolutions* with the *power to construe the resolutions as adopted.* The enactment of statutes, for instance, is a legislative function, but the interpretation of the statutes is a judicial matter. A resolution adopted by the Senate, in pursuance of a separate power vested in the Senate by the Constitution, is law, and the interpretation of such law is as appropriate a judicial function as the interpretation of statutory or other law. Nor does the fact that the Senate alone may adopt, amend, or repeal such resolutions prevent the interpretation of the resolutions from being an exercise of judicial power. Disagreement by the Senate with the court's interpretation of a resolution does not make the court's judg-

ment unenforceable any more so than would the legislative department's disagreement with a court's construction of an Act of Congress.

Further, a judgment or decree will operate to determine judicially the rights of the petitioners and respondents in this controversy. It will not be advisory. If favorable to the petitioners, the judgment will require the performance of certain acts by the respondents, *i.e.*, the surrender of the ballot boxes. Whatever might be said as to whether such judgment would be binding on the Senate as to the continued existence of the committee (a matter which seemed to give the District Court much concern, R. 163), it does not seem open to doubt that it would be binding on the parties to this controversy. It is enough that it binds these parties. Whatever changes, if any, the Senate by Resolution may make in the law governing the committee for the future are immaterial in determining the status of the committee and its right to possession of the ballot boxes and other election paraphernalia at the time of its demand upon the respondents.

The fact that the cause involves the determination through court proceedings of legal status, does not prevent it from being a case or controversy within the meaning of those terms as used in the Constitution, nor the judgment of the Court rendered therein from being an exercise of judicial power. *Tutun v. United States* (1926), 270 U. S. 568; *Fidelity National Bank and Trust Co. v. Swope* (1927), 274 U. S. 123.

The subject matter of the litigation in the present case is the ballot boxes and other election paraphernalia and the right of possession thereto. As an incident to arriving at its decision, the Court must determine the status of a Senate special select commit-

tee. The determination of the question of status, however, is not the subject matter of the litigation, though even if it were, under the decisions last cited, the determination would constitute an exercise of judicial power. The determination of the question of status is merely incidental to the subject matter of the litigation.

*By reason of the dismissal of the suit for lack of jurisdiction on the ground that it presented a legislative, not a judicial, matter, the lower courts found it unnecessary to determine the questions of law set forth in the remainder of this brief. The petitioners believe these questions are necessarily involved in the case and should have been decided.*

**II. The Jurisdiction of the Present Suit Has Been Vested in the United States District Courts by Section 24, Paragraph First, of the Judicial Code.**

1. The Present Suit is a Civil Suit in Equity.

The relief prayed for by the petitioners is relief in the nature of a mandatory injunction. While the proceeding was commenced by petition and not by bill, no objection has been raised by the respondents to the informality of the pleading or of the process issued, and, in the opinion of the District Court, any right to object to such informality may be regarded as waived. (R. 148.)

Relief in the form of a mandatory injunction, ancillary to a proper basis of equity jurisdiction as hereinafter set forth, is within the power of a Federal court of equity to grant. *Covington Stockyards Co. v. Keith* (1891), 139 U. S. 128; *In re Lennon* (1897), 166 U. S. 548; *Toledo A. A. and N. N. Ry. Co. v. Pennsylvania*

*Co.* (C. C. N. D. Ohio 1893), 54 Fed. 730, per Taft, J.; *Love v. Atchison T. & S. F. Ry. Co.* (C. C. A. 8th Cir., 1911), 185 Fed. 321, certiorari denied, 220 U. S. 618 (1911). Mandatory injunctions may be issued by a Federal court in equity against State and municipal officers to compel the performance of ministerial duties. *Loisel v. Mortimer* (C. C. A. 5th Cir., 1922), 277 Fed. 882; *Fox Film Corp. v. Chicago* (D. C. N. D. Ill. 1917), 247 Fed. 231; *Parsons v. Marye* (C. C. E. D. Va. 1885), 23 Fed. 113, reversed on other grounds (1884), 114 U. S. 325; *Norfolk Trust Co. v. Marye* (C. C. E. D. Va. 1885), 25 Fed. 654.

(*a*) *Equity jurisdiction to assist the National Government in the execution of its constitutional powers.*

The Federal courts have jurisdiction in equity to render assistance to the National Government by appropriate remedy in the exercise of a sovereign power or in the discharge of a sovereign duty vested in or imposed upon the National Government by the Constitution, expressly or impliedly. This jurisdiction is admitted by the District Court in its opinion in this case (R. 150-1).

*In re Debs* (1895), 158 U. S. 564, 584, 586, 600; *United States v. San Jacinto Tin Co.* (1888), 125 U. S. 273, 285; *United States v. Bell Telephone Co.* (1888), 128 U. S. 315, 367; *United States v. Rickert* (1903), 188 U. S. 432; *Heckman v. United States* (1912), 224 U. S. 413, 438-442, affirming *United States v. Allen* (C. C. A., 8th Cir. 1910), 179 Fed. 13, 16-7; *Sanitary District v. United States* (1925), 266 U. S. 405, 425-6. See also, *Colorado v. Toll* (1925), 268 U. S. 228.

Among the powers and duties vested in or imposed

upon the Senate by the Constitution are (1) the power to judge the elections, returns, and qualifications of its own members—Constitution, Art. I, §5; and (2) the power to legislate, in conjunction with the House of Representatives, upon the times and manner of holding senatorial elections.—Constitution, Art. I, §4. *Newberry v. United States* (1921), 256 U. S. 232, 247-8.

Implied in the powers of the Senate, above enumerated, are such auxiliary powers as are necessary and appropriate to make the expressed powers effective. Among these auxiliary powers is the power of inquiry. —*McGrain v. Daugherty* (1927), 273 U. S. 135.

The people of Pennsylvania have rights conferred on them by the Seventeenth Amendment in respect of the election of members of the United States Senate. Such rights involving the relationship of citizens of the United States to the Federal Government, the United States, as *parens patriae,* is authorized to protect when such protection is appropriate. *Massachusetts v. Mellon* (1923), 262 U. S. 447, 485. See also, *Missouri v. Illinois* (1901), 180 U. S. 208, 241; *Kansas v. Colorado* (1902), 185 U. S. 125; *Marshall Dental Mfg. Co. v. Iowa* (1913), 226 U. S. 460; *Georgia v. Tennessee Copper Co.* (1907), 206 U. S. 230; *Louisiana v. Texas* (1900), 176 U. S. 1, 19.

(*b*) *Absence of clear, adequate, and complete remedy at law.*

The remedy at law necessary to bar this suit must be a remedy in the Federal courts. A remedy at law in the State court is not sufficient to bar the jurisdiction of the District Court. *Risty v. Chicago, etc., Ry. Co.* (1926), 270 U. S. 378, 388. It is plain there is no

remedy at law in the Federal courts, it being well settled that the District Courts have no original jurisdiction in mandamus.

2. The Present Suit is a Suit Brought by the United States and by Officers of the United States Authorized by Law to Sue.

In order that the District Court may have jurisdiction of the present suit it is necessary that the suit be not only a civil suit in equity but that it be "brought by the United States, or by any officer thereof authorized by law to sue * * *."—Paragraph First, §24, Judicial Code.

(*a*) *The United States is the real party in interest.*

Any suit brought in the exercise of a constitutional power of the United States on behalf of citizens of the United States or for the protection of the interests of the United States or any of its judicial, legislative, or executive agencies, is a suit in which the United States is the real party in interest. *United States v. San Jacinto Tin Co.* (1888), 125 U. S. 273, 285; *In re Debs* (1895), 158 U. S. 564; *Sanitary District v. United States* (1925), 266 U. S. 405, 425-6.

If a suit involves a public interest which the United States undertakes to protect, or the interest of one of its own governmental agencies, such a suit is a suit "brought by the United States" whether or not so entitled. *Benton v. Woolsey* (1838), 12 Pet. 27; *Jecker v. Montgomery* (1855), 18 How. 110, 124-5.

In any event if it were found that in order to maintain jurisdiction, the United States, even though it is the real party in interest, is nevertheless required

to appear on the record as a complainant, the United States might, in the discretion of the court, without dismissal of the petition, be joined with the present petitioners by amendment under the broad powers granted the court by Rule 19 of the Equity Rules of the Supreme Court. See *Whitaker v. Whitaker Iron Co.* (D. C. N. D. W. Va., 1916), 238 Fed. 980, 991, affirmed (C. C. A. 4th Cir. 1918), 249 Fed. 531, certiorari denied (1918), 248 U. S. 564.

(*b*) *The petitioners are officers of the United States.*

The petitioners include four members of the United States Senate. Whether or not an United States Senator is an "officer of the United States" within the meaning of section 24 of the Judicial Code is a question of statutory interpretation and not a question of construction of the Constitution. *Lamar v. United States* (1916), 240 U. S. 60; *Lamar v. United States* (1916), 241 U. S. 103.

It was held in these cases that a Representative in Congress is "an officer acting under the authority of the United States" within the meaning a statute punishing a person for pretending to be such an officer. While the statute there under consideration did not use the term "officer of the United States," the court in its opinion relied on precedents holding that a Member of Congress is "an officer of the United States."

The case of *Burton v. United States* (1906), 202 U. S. 344, is not contrary to the above conclusion for the case was decided before the adoption of the Seventeenth Amendment of the Constitution. Inasmuch as all the Senators joined in the petition in the present case, were elected by the people and not by the legisla-

tures of their States, the reasoning of the Court in *Burton v. United States* is no longer applicable, since there seems no ground for distinguishing a Senator from a Representative in Congress who, under the Lamar case, is an officer of the United States.

In the few cases in State courts in which the question has arisen, the holding has been that a Senator or Representative in Congress is not a State officer but is an officer of the United States. *State ex rel Eaton v. Schmahl* (Minn. 1918), 167 N. W. 481; *State ex rel Chandler v. Howell* (1918), 104 Wash. 99; *State ex rel Spofford v. Gifford* (1912), 22 Idaho 613; *Eversole v. Brown* (1899), 21 Ky. L. Rep. 925.

The petitioner, Jerry C. South, was appointed by the committee as an officer authorized to represent the committee and act as its attorney. (R. 6-g). He took the usual oath of office. The Constitution vests in the Senate power to choose their officers, and customarily the power to choose such of their officers as are officers of the committees of the Senate, has been delegated to the respective committees, save in the case of choosing the chairmen of standing committees. In the case of the special select committee, such authority was specifically delegated through the authorization to employ "such assistants as may be deemed necessary by the committee." (Senate Resolution 227, 69th Congress.) The Constitution itself, in Article II, section 2, recognizes that officers of the United States may be appointed in a manner other than by the President, heads of departments, or courts of law, as specified in the section. The constitutional authority of the Senate to choose its own officers is one such other method of appointment. It is therefore believed that the petitioner, Jerry C. South, is an officer of the United

States in the Legislative Branch of the Government. In any event the misjoinder of the petitioner South would not deprive the District Court of jurisdiction. See *Erickson v. United States* (1924), 264 U. S. 246.

(*c*) *The petitioners are authorized by law to sue.*

The special select committee was—

> * * * vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

Among the powers of procedure provided by Senate Resolution 195, 69th Congress, is the power—

> * * * to require by subpoena or otherwise * * * the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The resolutions empowering the special select committee need not state in terms that the committee might institute suit. Such a power is implied from the powers to "require by subpoena or otherwise" and "to do all acts necessary." The committee is the agent of the Senate in conducting the inquiry. Under the ordinary principles of agency, authority "to do all acts necessary" to accomplish an end, or similar language, or authority to take possession of certain documents, or papers, includes the power to bring suit. *State ex rel Giroux v. Giroux* (1894), 15 Mont. 137; *Briggs v. Yetzer* (1897), 103 Iowa 342; *Ryan v. Tudor*

(1884), 31 Kan. 366; *Joyce v. Duplessis* (1860), 15 La. Ann. 242. See also, *Citizens' National Bank of Kingman v. Berry & Co.* (1894), 53 Kan. 696; *Potter v. New York Infant Asylum* (1887), 44 Hun. (N. Y.) 367.

The authority to bring the present suit, drawn from the Senate resolution heretofore quoted, is vested in the special select committee by "law" within the meaning of that term as used in paragraph First, section 24, of the Judicial Code. A resolution of the Senate is law if adopted in the execution of one of the separate constitutional powers of the Senate, such as its power to confirm appointments or ratify treaties, or its auxiliary power to conduct inquiries. In such cases the Senate is not dependent upon the action of the President or the House of Representatives. It is independent and its resolution is law as final and binding as a statute. Thus a person held under process of attachment issued under resolutions of the Senate in appropriate cases is restrained of his liberty by due process of "law." *McGrain v. Daugherty* (1927), 273 U. S. 135.

*(d) Continuing status of the special select committee.*

The respondents before the lower courts admitted that the Senate has power to create continuing select committees. They agreed that the only disputed question as to the status of the special select committee is, Did the Senate grant a continuing status to this particular committee? (R. 152.) The answer depends upon the proper construction of Senate Resolutions 195 and 324, 69th Congress.

(1) The Opinion of the President of the Senate.

Under the Constitution the Vice-President is the presiding officer of the Senate. It is impossible for him to perform his duties without interpreting and applying the rules of the Senate. Under the resolution creating and empowering the special select committee the Vice-President was also specifically under duty of appointing the original members thereof. As a result of the resignation of Senator Goff there was before the Vice-President for his decision the question as to whether the Vice-President was empowered to appoint Senator Goff's successor and as to whether the special select committee was legally in existence so that a vacancy existed. The determination of the Vice-President accorded with the position taken by the petitioners. See formal statement in full in *The Evening Star*, Washington, D. C., April 8, 1927, p. 1, column 1.

(2) The Opinion of the Supreme Court in *McGrain v. Daugherty.*

So far as the matters of duration and continuity are concerned, the language of the resolutions empowering the special select committee in the *McGrain v. Daugherty* case and the special select committee of which the petitioners are members, is substantially identical. This Court in *McGrain v. Daugherty* clearly indicates that the special select committee in that case was in existence after the expiration of the Congress during which it was created and did not expire with the expiration of that Congress. That case is a controlling precedent supporting the position of the petitioners that the special select committee of which they are members continued after the expiration of the 69th Congress.

(3) The Circumstances Under Which Senate Resolution 324 Was Adopted.

Senate Resolution 324 was adopted January 11, 1927, less than eight weeks before the session was required to terminate. It is inconceivable that the Senate could have expected the special select committee within this short time and during the closing weeks of a most crowded session to obtain possession of all the required ballot boxes and other election paraphernalia. It is likewise inconceivable that the Senate would not only expect the committee to take possession of the ballot boxes and other election paraphernalia but to "preserve" them for such a short period. Preservation implies at least the expiration of a reasonable period of time before the Senate would be prepared either by itself or through the Committee on Privileges and Elections or through any other committee to make appropriate use of the material obtained. The contested election case of Wilson v. Vare could not be decided during those eight weeks by the then membership of the Senate. In view of these circumstances it seems almost impossible to so construe the phrase "at such time or times * * * as it may deem necessary" to limit the committee to a period of eight weeks as is demanded by the respondents.

(4) Practice of the Senate.

The 16th Congress provided for certain standing committees to be appointed at the commencement of each session. This rule continued until the 48th Congress when it was provided that standing committees should be appointed at the commencement of each Congress rather than at each session of the Senate. As so

modified the rule still prevails as rule numbered XXV of the present Standing Rules of the Senate.

All the early Senate special select committees, and practically all subsequent special select committees save those in the most recent Congresses, were created without any specification as to their duration. They were not directed to report before a certain date; they were not specifically limited to a certain Congress nor particular sessions or recesses; *nor were they unqualifiedly authorized to sit at such times as the committee might determine to be advisable.* Such select committees were at first considered as expiring with the session of their creation. This view accorded with the rule as to standing committees prevailing from the 16th to the 48th Congress. Subsequently such select committees were considered as expiring not later than the Congress of their creation. This view accorded with the change in the rule as to standing committees made in the 48th Congress.

In conformity with the above situation resolutions were commonly adopted by the Senate at the close of Congress from the 51st to the 63rd Congresses continuing in existence both standing and select Senate committees from the expiration of the Congress to the commencement of the next regular session of the Senate. (R. 118-129.) Arguing from this fact the respondents contend that no special select committee can continue in existence after the expiration of the Congress of its creation without the adoption of such a continuing resolution. This argument is without force, for the reason that these continuing resolutions continued only those Senate special select committees which, by the resolutions creating them or by subsequent resolutions, had not been specifically given a duration ex-

tending beyond the Congress of their creation. During the period from the 51st to the 63rd Congress there were created at very infrequent intervals Senate special select committees specifically directed to report or to act during a subsequent Congress. But so far as has been discovered no Senate special select committee during this period was authorized "to sit at such time or times as it deemed necessary."

There is no presumption that a special select committee as to which the Senate has used language indicating a continuing period of activity expires with the Congress of its creation. Such a presumption could exist only in the case of a special select committee as to which the Senate has used no language whatever indicating a time for making a final report and no language relating to the sittings of the committee. The committee involved in the present case is not of such a character.

3. The Present Suit is Not a Suit Against a State.

Jurisdiction of the present suit in the District Court is not barred under section 233 of the Judicial Code, for the suit is not one against the State but one against local officers charged by the law of the State with the performance of a plain official duty requiring no exercise of discretion. Such an officer is liable to mandamus or injunction. This distinction has been made in cases arising under the Eleventh Amendment. *Board of Liquidation v. McComb* (1875), 92 U. S. 531, 541; *Huidekoper v. Hadley* (C. C. A. 8th Cir. 1910), 177 Fed. 1, writ of certiorari granted (1910), 218 U. S. 572, dismissed per stipulation of counsel (1911), 223 U. S. 735; *Rolston v. Missouri Fund Commissioners* (1887), 120 U. S. 390; *Graham v. Folsom* (1906), 200 U. S. 248.

The same distinction seems to apply with equal force to section 233 of the Judicial Code.

Under the Pennsylvania election laws, officers to whom ballot boxes containing the tickets and other documents are entrusted, are required to keep the same "to answer the call of any persons or tribunal authorized to try the merits of the election." (Pamphlet Laws Pa. 1923, 147-8; 1925, 103, 106.) Pennsylvania courts have held that Pennsylvania tribunals are not authorized to try the merits of the election of a member of Congress. *Twentieth Congressional District Election* (1924), 281 Pa. 561; *Commonwealth v. Emminger* (1871), 74 Pa. 479; *In Re Contested Election of McNeill* (1886), 111 Pa. 235; *Ransley's Contested Election* (1920), 268 Pa. 303; *Twenty-eighth Congressional District Nomination* (1920), 268 Pa. 313.

The present suit will compel the performance of the duty imposed upon the respondents by Pennsylvania law to answer the call of the tribunal authorized to try the merits of the election, namely, the Senate. The duty so enjoined upon these officials is purely ministerial and involves no exercise of discretion.

Respectfully submitted,

JAMES A. REED, Petitioner, *Pro se*, and Chairman of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, *for the Committee.*

JERRY C. SOUTH, Petitioner, *Pro se, and attorney-in-fact and representative of the Special Committee of the United States Senate acting under authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress.*

FILED

MAR 24 1927

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

No. 744

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. KING, BOIES M. LAFOLLETTE, JR., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 334 of the Sixty-ninth Congress, and JAMES C. SOUTH, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 334 of the Sixty-ninth Congress, *Petitioners*,

v.

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, and JOHN J. SANNER, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

## MOTION TO ADVANCE.

JAMES A. REED, Petitioner, Pro se, and Chairman of the Special Committee of the United States Senate, *for the Committee*.

JAMES C. SOUTH, Petitioner, *Pro se*, and Attorney at Law and Representative of the Special Committee of the United States Senate.

FRANCIS P. LEE,
*Legislative Counsel, United States Senate*.

Byron S. Adams Printing Co., Washington, D. C.

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*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, and JOHN J. SAILING, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, *Respondents*.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.**

## MOTION TO ADVANCE.

The petitioners move to advance this case for early hearing during the present term of court.

Notice that the above motion will be submitted to this Court on Monday, April 9, 1928, at the opening of the Court, or as soon thereafter as counsel can be heard, has been served upon opposing counsel, and opposing counsel has duly waived the usual fifteen day period therefor.

JAMES A. REED, Petitioner, *Pro se*, and Chairman of the Special Committee of the United States Senate, *for the Committee.*

JERRY C. SOUTH, Petitioner, *Pro se, and attorney-in-fact and representative of the Special Committee of the United States Senate.*

FREDERIC P. LEE,
*Legislative Counsel, United States Senate.*

## REASONS FOR THE MOTION.

The petitioners, acting as a duly empowered special committee of the United States Senate, demanded possession of certain ballot boxes and other election paraphernalia in the custody of the respondents. Respondents failed to comply with that demand and continue to do so. Proceedings were brought by the petitioners in the United States district court for the Eastern District of Pennsylvania to obtain possession of the ballot boxes and other election paraphernalia, but were dismissed for want of jurisdiction. The decree of that court was affirmed by order of the United States Circuit Court of Appeals for the Third Circuit. This Court on March 12, 1928, granted a writ of certiorari to review the order of the Circuit Court of Appeals. During the pendency of this litigation the ballot boxes and other election paraphernalia are required to be

retained in the custody of the respondents by reason of a temporary restraining order (R. 174) granted by the District Court at the time of the allowance of the appeal to the Circuit Court of Appeals.

1. *The prompt decision of the present case is necessary in order to expedite the work of the special committee in executing the duties imposed upon it.*

Under the original resolutions empowering the special committee, the committee was authorized to investigate expenditures to influence the nomination of any person as a candidate for election to membership in the United States Senate or to promote the election of any person as a member of the United States Senate, at the general election held in November, 1926. The committee was further authorized to take possession of ballot boxes and other election paraphernalia used in the senatorial election held in Pennsylvania on November 2, 1926, and preserve the same, and to take and preserve evidence as to fraud, irregularity, unlawful expenditure of money, intimidation of voters, and other acts or facts affecting the result of the election. The special committee of the Senate, while having made a partial report, has not completed its investigation nor made a final report upon the above matters, and by Senate Resolution 10, 70th Congress, the special committee was directed to continue to execute the directions of the several resolutions relating to it until the Senate accepts or rejects the final report of the special committee or otherwise orders.

The special committee was also directed by Senate Resolution 2, 70th Congress, to hear and report to the Senate upon the claim of William S. Vare to a seat in the Senate, in view of the fraud and corruption with which the Senate declared his credentials were prima

facie tainted. Until the making of such report and final action of the Senate thereon, William S. Vare is denied a seat in the Senate.

The prompt conclusion of the special committee's investigations and report to the Senate thereon under the above resolutions will be facilitated by a speedy decision in the instant case, for the decision will result in the release from the temporary restraining order of the ballot boxes and other election paraphernalia necessary to such investigations. That decision is a matter of great public interest to the State of Pennsylvania, for the full representation of the State in the Senate depends upon the decision. That decision is also a matter of great public interest to the citizens of the United States in the State of Pennsylvania and elsewhere, for their right to be represented by Senators of their choice under past and impending elections depends in considerable measure upon the full investigation of Senatorial elections by the Senate.

2. *The prompt decision of the present case is necessary in order to expedite the work of other committees of the Senate.*

The instant case involves a number of questions not heretofore decided by this Court. Among these questions are the following:

a. Whether a committee of the United States Senate may resort to the United States courts for aid in enforcing its process in lieu of enforcing that process through its own deputies.

b. Whether the Federal courts are vested with jurisdiction of suits brought by a committee of the Senate against local State officials to recover papers or documents necessary to lawful investigations authorized by the Senate in pursuance of its judicial and legisla-

tive powers, expressed or implied, under the Constitution; and more particularly whether the suit constitutes a civil suit in equity, whether it is brought by the United States or by officers of the United States, and whether the special committee in the instant case was authorized to bring suit.

The instant case also involves refusal of the lower courts to apply a pertinent decision of this Court. The petitioners urged before the lower courts that the special committee of the Senate was authorized to sit and act after the expiration of the 69th Congress. This question the lower courts refused to determine on the ground that the necessity of construing a Senate resolution in reaching a decision prevented the suit from being a controversy with which the Federal courts under the Constitution may be vested by Congress with jurisdiction to determine. The petitioners are of the opinion that the authority of the lower courts to determine the question was affirmed by this Court in the case of *McGrain v. Daugherty* (1927), 273 U. S. 135.

The Senate has pending several investigations of importance to the exercise of its legislative and judicial functions. In these investigations the above questions involved in the instant case may well again arise. The final determination of those questions as speedily as may be, is necessary in order that pending investigations and future investigations of the Senate may not be obstructed. Some of these investigations will doubtless continue during the next recess of the Senate, a period during which adverse court decisions following those of the lower courts in this case and refusing to determine the extent of the authority vested in a

Senate Committee, would be peculiarly obstructive in their effect.

Respectfully submitted,

JAMES A. REED, Petitioner, *Pro se*, and Chairman of the Special Committee of the United States Senate, *for the Committee.*

JERRY C. SOUTH, Petitioner, *Pro se, and attorney-in-fact and representative of the Special Committee of the United States Senate.*

FREDERIC P. LEE,
*Legislative Counsel, United States Senate.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 744

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. King, Robert M. La Follette, jr., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and Jerry C. South, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, Petitioners

*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, Pennsylvania, the Prothonotary of Delaware County, and John J. Sailing, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, Respondents

## BRIEF FOR PETITIONERS

### OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern district of Pennsylvania rendered upon the decree dismissing the bill of

complaint for want of jurisdiction, will be found on page 145 of the Record and in 21 Fed. (2d) 144. The opinion of the United States Circuit Court of Appeals for the Third Circuit was a *per curiam* opinion which merely stated that the decree below was affirmed on the ground of the lack of jurisdiction in the lower court as stated in its opinion. It will be found on page 187 of the Record, and in 21 Fed. (2d) 1018.

**JURISDICTION**

The decree of the District Court of the United States for the Eastern District of Pennsylvania was entered July 29, 1927. (R. 166.) From this decree an appeal was prosecuted to the United States Circuit Court of Appeals for the Third Circuit. The Circuit Court of Appeals affirmed the decree of the District Court on November 8, 1927. (R. 187.)

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended (43 Stat. 938). Petition for writ of certiorari to review the order of the Circuit Court of Appeals in accordance with that section, was granted by this Court on March 12, 1928, and motion to advance the case for early hearing during the present term of court was granted by this Court on April 16, 1928.

**QUESTIONS PRESENTED**

The questions for determination in this case are:

(1) Whether there is presented a case or controversy of which the Federal courts may under the Constitution be vested by the Congress with jurisdiction to determine, and

(2) If so, whether the Federal courts have by Act of Congress been so vested with jurisdiction, and more particularly—

(a) Whether the case constitutes a suit of a civil nature in equity.

(b) Whether it is brought by the United States.

(c) Whether the petitioners are officers of the United States.

(d) Whether the petitioners have been authorized by law to bring suit.

(e) Whether the suit is against local officers of the State of Pennsylvania to compel the performance of a ministerial duty imposed upon them by law and is not a suit against the State.

## STATUTES INVOLVED

Pertinent excerpts from the Judicial Code sections principally involved and from the Pennsylvania statutes relating to custody of ballots and other election papers are set forth in Appendix A to this brief. The resolutions of the Senate creating and empowering the Special Committee are set forth in Appendix B to this brief.

## STATEMENT

Upon May 19, 1926, and January 11, 1927, S. Res. 195, 69th Cong., 1st Sess., and S. Res. 324, 69th Cong., 2nd Sess., respectively, were adopted by the United States Senate. The resolutions created and empowered a special select committee of five members of the Senate.

Senate Resolution 195 authorized the committee to investigate expenditures, and agreements for appointment or election to office, made to influence the nomination of any person as a candidate for membership in the United States Senate at the general election held in November, 1926. The committee was empowered to sit and act at such time or times and at such place or places as it might deem necessary, to require by subpœna or otherwise the attendance of witnesses and the production of books, papers, and documents, and to do such other acts as might be necessary in the matter of the investigation.

Senate Resolution 324, after referring in the preamble to charges of fraudulent and unlawful practices made in connection with the nomination and the alleged election of William S. Vare as Senator from Pennsylvania at the election of November 2, 1926, further authorized the special select committee to take possession of and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists, and other records, books, and documents used in the election and to take and preserve all evidence of fraud and other irregularities affecting the result of the election. The Resolution invested the committee, in connection with the execution of such additional authority, with all powers of procedure that the committee possessed under Senate Resolution 195. Senate Resolution 324 also directed the Sergeant at Arms to attend and execute the directions of the committee and em-

powered the special select committee to act through a subcommittee of one or more of its members.

The petitioners, James A. Reed, Charles L. McNary, William H. King, and Robert M. LaFollette, Jr., together with Senator Guy D. Goff, of West Virginia, were appointed as members of the special committee. Senator Goff subsequently resigned because of absence from the country due to ill health. (R. 42 and 180.)

Upon February 21, 1927, the petitioner, James A. Reed, introduced Senate Resolution 364, 69th Congress, 2d session, which at the time of introduction (68th Cong. Rec. 4307) provided that the Senate resolutions creating and empowering the special committee should continue in force during the 70th Congress, that in addition to its authority to take possession of and preserve the ballot boxes and election papers the special committee should have authority to open the ballot boxes, examine and tabulate the ballots, and scrutinize all books, papers, and documents, and that the authority of the special committee should extend to cover the nomination and election of any Senator at any general election held during the year 1926.

As thus introduced the resolution applied to senatorial elections in other States as well as in Pennsylvania. Subsequently, on March 2, 1927, the petitioner, James A. Reed, under the rules of the Senate, modified the resolution (68th Cong. Rec. 5293) so as to confine its scope to the senatorial election in Pennsylvania and to continue the resolutions creating and

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empowering the committee in force until December 30, 1927. The powers of opening the ballot boxes, examining and tabulating ballots, and scrutinizing books, papers, and documents were retained unmodified.

On March 4, 1927, the petition of contest of William B. Wilson against William S. Vare was received by the Senate and referred to the Committee on Privileges and Elections. (R. 14 and 38–41; 68th Cong. Rec. 5895.)

The Sixty-ninth Congress expired *sine die* March 4, 1927, without final action being taken on Senate Resolution 364 (R. 37–8) or the petition of contest.

The petitioner, James A. Reed of Missouri, chairman of the special select committee, on March 5th, requested the opinions of Senators William E. Borah of Idaho, chairman of the Committee on Foreign Relations, George W. Norris of Nebraska, chairman of the Committee on the Judiciary, and Guy D. Goff of West Virginia, then a member of the special select committee, as to the power of the committee to proceed during the recess of the Senate. The opinions were given and were all favorable to the power of the committee. (R. 51–62.)

Thereafter the special select committee demanded that the Sergeant at Arms of the Senate act for and carry out the orders of the committee in pursuance of Senate Resolution 324 and take possession of certain ballot boxes and election papers used in the general election in the State of Pennsylvania on November 2, 1926, at which ballots were cast for an United

States Senator. The Sergeant at Arms failed and refused to act for and carry out the orders of the committee. (R. 44.) The committee thereupon authorized and directed the petitioner, Jerry C. South, to act as its attorney and representative and directed him to take possession of the ballot boxes and election papers. (R. 32.)

Senator Henry W. Keyes of New Hampshire, chairman of the Committee to Audit and Control the Contingent Expenses of the Senate, refused to approve vouchers for the payment of the expenses of the special select committee out of the contingent funds of the Senate as authorized by Senate Resolutions 227 and 258 of the Sixty-ninth Congress, first session, and 324 of the Sixty-ninth Congress, second session. (R. 43–5.)

The petitioner, Jerry C. South, in pursuance of the authority conferred on him, demanded that the respondents, the County Commissioners of Delaware County, Pennsylvania, the Prothonotary of that county, and John J. Sailing, a justice of the peace of that county, deliver into the petitioner's possession all ballot boxes and their contents, ballots, return sheets, tally sheets, voters' lists, voters' check lists, ballot check lists, registration lists, and other election records, books, and documents in the custody of the respondents. The respondents failed and refused to comply with this demand, and continue to do so.

In consequence of the refusal the special select committee directed that the petition in the present cause be filed and the petitioners, William H. King

and Robert M. La Follette, Jr., together with the petitioner, Jerry C. South, personally appeared before the Court and the attorneys of the respondents and renewed the demand. (R. 33 and 49–50.) The petition was dismissed by the District Court for want of jurisdiction. (R. 166.) A petition for appeal to the Circuit Court of Appeals for the Third Circuit was filed with and allowed by the District Court (R. 167) and a petition for temporary restraining order preserving the subject matter of the litigation from destruction and from removal from the jurisdiction of the District Court or the Circuit Court of Appeals until further order of the District Court, was granted by the District Court (R. 170–5).

On November 8, 1927, the Circuit Court of Appeals by a *per curiam* opinion affirmed the decree of the lower court, dismissing the petition for lack of jurisdiction and adopted the opinion of the lower court. (R. 186–7.)

The petitioners thereupon applied to this Court for a writ of certiorari to review the order of the Circuit Court of Appeals. The writ was granted March 12, 1928. (R. 189.)

**SPECIFICATION OF ASSIGNED ERRORS TO BE URGED**

The assigned errors which will be urged in this case are as follows:

(1) The holding that the case depends upon the determination of a legislative and not a judicial question.

(2) The decreeing that the District Court had no jurisdiction of the case and that the bill of complaint of the petitioners be dismissed.

(3) The failure to decree the right of petitioners to obtain possession under appropriate court orders of such ballot boxes and their contents, ballots, return sheets, tally sheets, voters' lists, voters' check lists, ballot check lists, registration lists, and other election records, books, and documents set forth in the bill of complaint as will enable the petitioners to carry out the separate constitutional powers granted to the United States Senate by the Constitution of the United States.

(4) The failure to hold that the petitioners, James A. Reed, Charles L. McNary, William H. King, and Robert M. LaFollette, Jr., constitute a special Senate committee continuing in existence and authorized to act subsequent to the expiration of the 69th Congress.

(5) The failure to hold that the case is a civil suit in equity brought by the United States or officers thereof authorized by law to sue.

(6) The failure to hold that the case is a civil suit in equity brought against local State officers to compel the performance of an official duty imposed by law and requiring no exercise of discretion.

## ARGUMENT

### I. The Present Cause Presents a Controversy Which Requires the Exercise by the Courts of the Judicial Power of the United States

The District Court dismissed the petition upon the ground that the cause presented for determination could not result in a judgment, the rendition of which would be the exercise of judicial powers. The point was not raised or argued by counsel for either petitioners or respondents before that Court. The Court came to this conclusion by the following steps: the Constitution vests in the Senate the determination of the rules of its proceedings (R. 161); the regulation of the mode and manner of procedure of its committees is a part of the determination of the rules of proceedings (R. 161–2); this determination is exclusively for the Senate, except that "in cases or controversies such, for instance, as habeas corpus proceedings," a court may construe the rules of proceedings of the Senate (R. 162–3); the Senate would not be bound by a judgment of the court in the instant case, "because of its constitutional right to determine under its rules of proceedings whether or not the committee it once authorized to act for it, has continuing power to act under that authority" (R. 163).

The Court states its conclusions in the following language (R. 165–6):

> Inasmuch as the case of the petitioners is based upon the determination of the authority conferred upon them by the Senate of the United States under the rules of its proceed-

> ings and the determination of that question is, under the Constitution, conferred upon the Senate alone, my conclusion is that the case depends upon the determination, not of a judicial, but of a legislative question; that no finding by this court that the Senate has continued under its proceedings the life of the Committee authorized by Senate Resolutions 195 and 324 beyond the end of the Session of the 69th Congress, would be final, and, therefore, a decree, based thereon, would not be a decree which would be final, unless modified or reversed by a court having appellate jurisdiction, but would be subject to the determination of the Senate of the rules of its proceedings.

Therefore, according to the District Court, the construction of a Senate resolution is a legislative matter, but not necessarily beyond the constitutional power of the courts. The District Court admits that in some instances a court may construe such resolutions. One such instance the District Court finds in *McGrain* v. *Daugherty* (1927), 273 U. S. 135. The District Court's interpretation of this case is that a justiciable matter is presented because the case had to do with a writ of *habeas corpus* which is expressly mentioned in the Constitution, and that the substantial distinction between the present case and the *Daugherty case* rests on this basis of *habeas corpus*. It is submitted that the District Court, in its interpretation of the *Daugherty case*, imputes to that case a doctrine of jurisdictional limitation which the case itself does not justify—a doctrine that limits the constitutional power of Federal courts to construe

the legal effect of Senate resolutions to those cases involving proceedings named in the Constitution. This Court itself did not put the *Daugherty case* on any such doctrine. The District Court did not suggest, and the petitioners are unable to find, any basis for such a doctrine. Judicial relief may be sought not only in accordance with a proceeding mentioned in the Constitution, such as *habeas corpus*, but also in any other recognized judicial proceeding, such as a suit for equitable relief as in the present case. Indeed, the District Court assumes that there are "other cases" besides *habeas corpus* (R. 159) where courts may construe Senate resolutions, but denies that this case is one of them. Therein is involved the underlying question now presented for decision: Whether a Federal court constitutionally *can have* jurisdiction to determine whether the petitioners or respondents are entitled to the present possession of the ballot boxes and election papers.

It is submitted that this is a proper matter for judicial determination, that it is a "case" or "controversy" within the meaning of the Constitution.

In the first place, there is no want of adverse parties to create a controversy and there is a real conflict between the claims of these parties. Each side claimed to be entitled to the present possession of certain subject matter, the ballot boxes and election papers. The claims are presented in an established and well recognized form of proceeding, a suit in equity. If the position of the parties were

reversed—that is to say, if the members of the Senate committee had actually seized the ballot boxes and election papers and the present respondents had instituted appropriate proceedings against them for so doing and the members of the committee attempted to justify their action by virtue of the authority conferred by the Senate—it would seem that there would be present a matter appropriate for court action.

In the next place, this conflict of claims between the adversary parties raises a question of law, namely, what is the proper interpretation of the Senate resolutions in respect of the existence and power of the special select committee. The District Court, in holding that this is a legislative and not a judicial function, has confused the *power to adopt resolutions* with the *power to construe the resolutions as adopted.* The enactment of statutes, for instance, is a legislative function. The interpretation of the statutes is a judicial matter. A resolution adopted by the Senate, in pursuance of a separate power vested in the Senate by the Constitution, is law, and the interpretation of such law is as appropriate a judicial function as the interpretation of statutory or other law. Nor does the fact that the Senate alone may adopt, amend, or repeal such resolutions prevent the interpretation of the resolutions from being an exercise of judicial power.

Further, a decree will operate to determine judicially the rights of the petitioners and respondents in this controversy. It will not be advisory. If

favorable to the petitioners, the judgment will require the performance of certain acts by the respondents, *i. e.*, the surrender to the petitioners of the ballot boxes and election papers. Whatever might be said as to whether such decree would be binding on the Senate in its subsequent dealings with the committee (a matter which seemed to give the District Court much concern, R. 163), it does not seem open to doubt that the decree would be binding on the parties to this controversy. It is enough that it binds these parties and would be sufficient for petitioners' present object. Certainly the trial court shows unnecessary concern regarding further possible action by the Senate when the authority of the committee plainly discloses the Senate's determination to investigate the election of a Senator, a purpose the accomplishment of which primarily requires the possession of the ballot boxes and election papers pleaded as the subject of the suit.

The subject matter of the litigation in the present case is the ballot boxes and election papers and the right of possession thereto. As an incident to arriving at its decision, the Court must determine the status of a Senate special select committee. The fact that the cause involves the determination through court proceedings of legal status, does not prevent the cause from being a case or controversy within the meaning of those terms as used in the Constitution, nor the judgment of the Court rendered therein from being an exercise of judicial power. *Tutun* v. *United States* (1926), 270 U. S. 568; *Fidelity National Bank and Trust Co.* v. *Swope* (1927), 274

U. S. 123. The determination of the question of status, however, is not the subject matter of the litigation, though even if it were, under the decisions last cited, the determination would constitute an exercise of judicial power. The determination of the question of status is merely incidental to the subject matter of the litigation.

*By reason of the dismissal of the suit for lack of jurisdiction on the ground that it presented a legislative, not a judicial, matter, the lower courts found it unnecessary to determine the questions of law set forth in the remainder of this brief. The petitioners believe these questions are necessarily involved in the case and should be decided.*

## II. The Jurisdiction of the Present Suit has Been Vested in the United States District Courts by Section 24, Paragraph First, of the Judicial Code

### 1. The present suit is a civil suit in equity

The relief prayed for by the petitioners is relief in the nature of a mandatory injunction. While the proceeding was commenced by petition and not by bill, no objection has been raised by the respondents to any informality in the pleading or in the process issued, and, in the opinion of the District Court, any right to object to any such informality may be regarded as waived. (R. 148.)

Relief in the form of a mandatory injunction is within the power of a Federal court of equity to grant. *Covington Stockyards Co.* v. *Keith* (1891), 139 U. S. 128; *In re Lennon* (1897), 166 U. S. 548; *State of Washington ex rel Markham* v. *Seattle and*

*R. V. Ry. Co.* (D. C. W. D. Wash. 1924), 1 F. (2d) 605, and 2 F. (2d) 264. Mandatory injunctions may be issued by a Federal court in equity against State and municipal officers to compel the performance of ministerial duties. *Fox Film Corp.* v. *Chicago* (D. C. N. D. Ill. 1917), 247 Fed. 231; *Parsons* v. *Marye* (C. C. E. D. Va. 1885), 23 Fed. 113, reversed on other grounds (1885), 114 U. S. 325; *Norfolk Trust Co.* v. *Marye* (C. C. E. D. Va. 1885), 25 Fed. 654. While the Federal courts may not issue mandamus at law (*Covington and Cincinnati Bridge Co.* v. *Hager* (1906), 203 U. S. 109; *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.* (1905), 197 U. S. 536; *Rosenbaum* v. *Bauer* (1887), 120 U. S. 450) this does not prevent the issuance of a mandatory injunction by a Federal court in equity. The mandatory injunction will issue whenever its issuance is not a mere attempt to do indirectly what can not be accomplished in a suit at law, but is issued in pursuance of a recognized basis of equity jurisdiction.

(A) EQUITY JURISDICTION TO ASSIST THE NATIONAL GOVERNMENT IN THE EXECUTION OF ITS CONSTITUTIONAL POWERS

The Federal courts have jurisdiction in equity to render assistance to the National Government by appropriate remedy in the exercise of a sovereign power or in the discharge of a sovereign duty vested in or imposed upon the National Government by the Constitution, expressly or impliedly. This jurisdiction is well established by a long line of cases decided by this Court and is admitted by the lower court in its opinion. (R. 150–1.)

(*a*) *The judicial precedents*

The leading case is *In re Debs* (1895), 158 U. S. 564, in which this Court sustained the validity of an injunction granted by the Circuit Court restraining officers of a labor organization from obstructing or interfering with interstate commerce and the mails. The Court expressly refused to base its decision on the Sherman Act, stating (p. 600) that it preferred to rest its judgment on "broader" grounds. The Court said:

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court (p. 584).
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> * * * whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from

> the courts, or prevent it from taking measures therein to fully discharge those constitutional duties (p. 586).

To the same effect are: *United States* v. *San Jacinto Tin Co.* (1888), 125 U. S. 273, 285; *United States* v. *Bell Telephone Co.* (1888), 128 U. S. 315, 367; *United States* v. *Rickert* (1903), 188 U. S. 432; *Heckman* v. *United States* (1912), 224 U. S. 413, 438–442, affirming *United States* v. *Allen* (C. C. A., 8th Cir. 1910), 179 Fed. 13, 16–7; *Sanitary District* v. *United States* (1925), 266 U. S. 405, 425–6.

In *Colorado* v. *Toll* (1925), 268 U. S. 228, there is presented a situation the converse of that in the present suit. The State of Colorado brought a bill in equity to enjoin a Federal officer from interfering with the sovereign right of the State to regulate motor-vehicle traffic in the Rocky Mountain National Park. This Court not only found that the State had sovereign authority over the regulation of such traffic but that a bill in equity was a proper proceeding for preventing interference by a Federal officer with such authority. No property interest of the State was involved. The Court said:

> The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States (p. 230).

In *Missouri* v. *Holland* (1920), 252 U. S. 416, a similar bill was brought against a Federal officer to restrain him from invading sovereign rights of a State. The jurisdiction of the District Court to entertain the bill was sustained, although the case was dismissed on the merits.

If a Federal court has jurisdiction in equity to prevent a Federal officer from interfering with the full exercise of the sovereign rights of a State, it has jurisdiction to prevent local officers from interfering with the full exercise of the sovereign rights of the Nation.

(*b*) *The Constitutional Power of Inquiry of the Senate Is Involved in the Present Case*

Among the sovereign powers and duties vested in or imposed upon the Senate by the Constitution are (1) the power to judge the elections, returns, and qualifications of its own members (Constitution, Art. I, §5) and (2) the power to legislate, in conjunction with the House of Representatives, upon the times and manner of holding senatorial elections. (Constitution, Art. I, §4.) *Newberry* v. *United States* (1921), 256 U. S. 232, 247–8.

Implied in the sovereign powers of the Senate, above enumerated, are such auxiliary powers as are necessary and appropriate to make the expressed powers effective. Among these auxiliary powers is the power of inquiry. *McGrain* v. *Daugherty* (1927), 273 U. S. 135. In that case the Court said, after re-

ferring to sections 101–4 and 859 of the Revised Statutes:

> They show very plainly that Congress intended thereby (a) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act; (b) to recognize that such inquiries may be conducted through committees; * * * (p. 168).

Then after discussing certain cases, the Court continues—

> While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, *in their separate relations*, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the expressed powers effective; * * * (p. 173, italics ours).

The Court thereupon concludes that the power of inquiry, with process to enforce it, is an essential and appropriate auxiliary not only to the judicial powers of either House of Congress but also to the legislative functions of each House of Congress in its separate relations.

*(c) The Constitutional Power of Inquiry Has Been Vested by the Senate in the Special Select Committee*

In the devolution of the Senate's auxiliary powers of inquiry with respect to the election of a senator at the general election held in Pennsylvania, November 2, 1926, the Senate has divided these powers between two committees, namely, the special select committee who are the petitioners in the present case, and the standing committee on privileges and elections.

The special select committee was given power of inquiry as to expenditures to influence the nomination of any person as candidate for election to membership in the Senate or to promote the election of any person as a member of the Senate at such general election, and the duty of taking possession of ballot boxes and election papers and preserving the same and taking and preserving evidence as to fraud, irregularity, unlawful expenditure of money, intimidation of voters, and other acts or facts affecting the result of such election. S. Res. 195, 69th Cong., 1st Sess., and S. Res. 324, 69th Cong., 2nd Sess. Subsequent to the commencement of the present suit, the Senate further directed the Senate committee to inquire as to, and report to the Senate upon, the claim of William S. Vare to a seat therein, in view of the fraud and corruption with which the Senate declared his credentials were prima facie tainted.

To the committee on privileges and elections was referred the petition of William B. Wilson contesting

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the election of William S. Vare. (R. 14; 68 Cong. Rec. 5895.) Subsequent to the commencement of the present suit, that committee has been directed to hear and determine the contest. S. Res. 68, 70th Cong., 1st Sess.

The special select committee, in order to facilitate the exercise of the powers of inquiry devolving upon it, was authorized and directed to require the production of books, papers, and documents and to take possession and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists, and other records, books and documents used in the election. S. Res. 195, 69th Cong., 1st Sess.; S. Res. 324, 69th Cong., 2nd Sess. The committee on privileges and elections subsequent to the commencement of this suit was authorized, in order to facilitate the exercise of the powers of inquiry devolving upon it, to require the production of papers, books, documents, or other evidence. S. Res. 68, 70th Cong., 1st Sess. The special select committee, therefore, has powers of inquiry independent of those of the committee on privileges and elections and independent authority to take possession of ballot boxes and election papers involved in the Pennsylvania election of November 2, 1926.

The use that the Senate proposes to make of the information obtained as a result of the special select committee's exercise of its powers of inquiry, is not specifically stated in the Senate Resolutions creating and empowering that committee. As heretofore

shown, the Senate is entitled to use its auxiliary powers of inquiry, and information acquired as a result thereof, in connection with both its legislative powers and its necessary function of judging the qualifications of its own members. It seems a fair implication that the information acquired by the special select committee will be used by the Senate to determine the claim of William S. Vare to a seat in the Senate, irrespective of the determination of the Senate in the matter of the contest between William B. Wilson and William S. Vare. It seems also a fair implication that the information obtained by the special select committee as the result of the exercise of its powers of inquiry may be used as a basis for further legislation upon the manner of holding Senatorial elections. In any event, as this court has stated, the Senate need not in advance declare in its resolutions of inquiry or elsewhere, what it meditates accomplishing. The assumption can not be indulged that the Senate is making an inquiry without a legitimate object. *McGrain* v. *Daugherty* (1927), 273 U. S. 135.

(B) EQUITY JURISDICTION TO ASSIST NATIONAL GOVERNMENT AS PARENS PATRIAE

This court has also held that a sovereign State, even without pecuniary interest in a controversy, may invoke the aid of a Federal court in equity as "*parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens."; *Missouri* v. *Illinois* (1901), 180 U. S. 208, 241, *Kansas* v. *Colorado* (1902), 185 U. S. 125; *Marshall Dental Mfg. Co.* v. *Iowa* (1913), 226 U. S.

460; *Georgia* v. *Tennessee Copper Co.* (1907), 206 U. S. 230; *Louisiana* v. *Texas* (1900), 176 U. S. 1, 19; *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553. An examination of these cases discloses that this Court in considering the rights of the sovereign is disposed to give the fullest application to the doctrines of equity in the interest of the fulfilment of constitutional and sovereign rights. Thus in *Georgia* v. *Tennessee Copper Co., supra*, which was a bill to enjoin the discharge of noxious gases over the State line, the court said (p. 237–8):

> If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. * * * The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. * * *
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> If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The doctrine of the above cases applies in respect of the United States as well as the several States. The people of Pennsylvania have rights conferred on them by the Seventeenth Amendment in respect of the election of members of the United States

Senate. Such rights involve the relationship of citizens of the United States to the Federal Government. The United States, as *parens patriae*, is authorized to protect these rights when such protection is appropriate. *Massachusetts* v. *Mellon* (1923), 262 U. S. 447, 485; *Florida* v. *Mellon* (1927), 273 U. S. 12.

(C) ABSENCE OF CLEAR, ADEQUATE, AND COMPLETE REMEDY AT LAW

The remedy at law necessary to bar this suit must be a remedy in the Federal courts. A remedy at law in the State court is not sufficient to bar the jurisdiction of the District Court, *Risty* v. *Chicago, etc., Ry. Company* (1926), 270 U. S. 378, 388. It is plain there is no remedy at law in the Federal courts, it being well settled that the District Courts have no original jurisdiction in mandamus. *Covington and Cincinnati Bridge Co.* v. *Hager* (1906), 203 U. S. 109; *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.* (1905), 197 U. S. 536; *Rosenbaum* v. *Bauer* (1887), 120 U. S. 450.

2. THE PRESENT SUIT IS A SUIT BROUGHT BY THE UNITED STATES AND BY OFFICERS OF THE UNITED STATES AUTHORIZED BY LAW TO SUE

In order that the District Court may have jurisdiction of the present suit it is necessary that the suit be not only a civil suit in equity but that it be "brought by the United States, or by any officer thereof authorized by law to sue * * *." (Paragraph First, §24, Judicial Code.)

It is to be noted that the requirements are in the alternative. However, the present suit is brought, within the meaning of the above provision, both by the United States and by officers thereof authorized by law to sue.

(A) THE UNITED STATES IS THE REAL PARTY IN INTEREST

The United States is the real party in interest in the present suit. As hereinbefore set forth it is the constitutional powers of the National Government that are involved in the present suit. These powers are powers of inquiry auxiliary to the power to judge the elections, returns, and qualifications of members of the Senate, or auxiliary to the power to legislate for the regulation of the times and manner of holding Senatorial elections not only in order to protect the Senate but also to protect the electoral rights of citizens of the United States. The suit presents for decision the right of the United States to preserve the integrity of the Legislative Branch of the Government in part through the exercise by a Senate committee of these constitutional powers of inquiry.

Any suit brought in the exercise of a constitutional power of the United States on behalf of citizens of the United States or for the protection of the interests of the United States or any of its judicial, legislative, or executive agencies, is a suit in which the United States is the real party in interest. *United States* v. *San Jacinto Tin Co.* (1888), 125 U. S. 273; *In re Debs* (1895), 158 U. S. 564; *Sanitary District* v. *United States* (1925), 266 U. S. 405. It may not be

said that the National Government has a less interest in the execution of powers of the Legislative Branch of the Government than of the Executive Branch.

If a suit involves a public interest which the United States undertakes to protect, or the interest of one of its own governmental agencies, such a suit is a suit "brought by the United States" whether or not so entitled. *Benton* v. *Woolsey* (1838), 12 Pet. 27; *Jecker* v. *Montgomery* (1855), 18 How. 110, 124–5. See also the following cases to the effect that suit against an officer of the United States is a suit against the United States if the United States is the real party in interest: *International Postal Supply Co.* v. *Bruce* (1904), 194 U. S. 601; *Louisiana* v. *McAdoo* (1914), 234 U. S. 627; *Wells* v. *Roper* (1918), 246 U. S. 335; *Lambert Co.* v. *Baltimore & Ohio R. R. Co.* (1922), 258 U. S. 377, 382–3; *Morrison* v. *Work* (1925), 266 U. S. 481.

In any event if it were found that in order to maintain jurisdiction, the United States, even though it is the real party in interest, is nevertheless required to appear on the record as a complainant, the United States may, in the discretion of the court, without dismissal of the petition, be joined with the present petitioners by amendment under the broad powers granted the court by Rule 19 of the Equity Rules of the Supreme Court.

In order for a suit to be brought by the United States it need not necessarily be instituted by the Department of Justice. The Congress has the power to designate the officers or agencies to represent the

Government in suits other than those brought to enforce the separate constitutional rights of either House. Thus it has in general designated the Department of Justice, including the United States District Attorneys. Exceptions are occasionally made, however. For instance, in recent years the conduct of litigation affecting the Emergency Fleet Corporation, and the conduct of litigation involving certain oil leases, was not placed in the hands of the Department.

Congress, however, has never granted exclusively to the Department of Justice power to conduct litigation incident to the exercise of the separate constitutional powers vested in either House. The Constitution itself prevents the conduct of impeachment trials by persons other than the House Managers. The prosecution of contempts suffered by either House is another class of litigation that is incident to the separate constitutional prerogatives of either House, and that is not to be conducted by the Department.

There may not be imputed to the Congress any intent to vest in the Department of Justice the discretion as to whether or not suit should be instituted to enforce any of the separate constitutional rights of the Senate. But even if such intent is imputed to the Congress and an Act of Congress to such effect could be found, such an Act is not to be construed as affording an exclusive procedure. It could not deprive the Senate of its power to resort directly, if it so desired, to the courts in

aid of the execution by the Senate of one of its separate powers under the Constitution. The Senate itself, or a duly authorized committee or other representative thereof, is the only governmental agency having the right to determine whether or not resort shall be had to the courts for the enforcement of such rights and to determine by whom the Senate is to be represented in any necessary judicial proceedings. Certainly it is not seriously to be contended that if the Department of Justice refused to represent the Senate and bring appropriate judicial proceedings in its behalf, the Senate must remain idle and abandon that peaceable resort to the courts commended by this court in the *Debs case*. The Senate is not dependent upon the Executive for the assertion of its separate constitutional rights in the courts or elsewhere. Suit to enforce such rights is to be instituted through such agencies as the Senate may determine.

(B) THE PETITIONERS ARE OFFICERS OF THE UNITED STATES

The petitioners include four members of the United States Senate. Whether or not an United States Senator is an "officer of the United States" within the meaning of section 24 of the Judicial Code is a question of statutory interpretation and not a question of construction of the Constitution. *Lamar* v. *United States* (1916), 240 U. S. 60; *Lamar* v. *United States* (1916), 241 U. S. 103.

It has been held (*Lamar* v. *United States* (1916), 241 U. S. 103) that a Representative in Congress is "an

officer acting under the authority of the United States" within the meaning of a statute punishing a person for pretending to be such an officer. While the statute there under consideration did not use the term "officer of the United States," the court in its opinion relied on precedents holding that a Member of Congress is "an officer of the United States."

In *Ex parte Yarborough* (1884), 110 U. S. 651, this court states that the Constitution "created the office of member of Congress." This statement was cited with approval in *Swafford* v. *Templeton* (1902), 185 U. S. 487, and in *Wiley* v. *Sinkler* (1900), 179 U. S. 58; and see *United States* v. *Aczel* (D. C. Ind., 1915) 219 Fed. 917–932, affirmed (C. C. A. 7th circuit, 1916) 232 Fed. 652, holding that since the adoption of the Seventeenth Amendment and under the Act of June 4, 1914, the right to vote for a United States Senator is a right secured by the Constitution and laws of the United States. This appears to put Representatives and Senators of the United States on a parity in the light of Yarbrough's and similar cases. If the office of Senator is created by the Constitution of the United States it would seem that it is an office of the United States and that the incumbent of that office must be considered as "an officer of the United States."

The case of *Burton* v. *United States* (1906), 202 U. S. 344, is not contrary to the above conclusion that a Senator is an officer of the United States for the purposes of section 24 of the Judicial Code.

Burton, a Senator, was convicted of an offense for which the statute provided that any person violating the statute should be subject to fine and imprisonment, and in addition should be "incapable of holding any office of honor, trust, or profit under the Government of the United States." The judgment of conviction added this clause. It was contended that this judgment was inconsistent with the constitutional right of the Senator to hold for the full term for which elected, and operated of its own force to exclude a convicted Senator from the Senate, which body, under the Constitution, has exclusive power to expel its members. The court pointed out that the addition of the words to the judgment had no effect. They might have been omitted, as the statute itself imposed the incapacity of holding office, and the judgment of conviction did not operate *ipso facto* to vacate the seat or compel the Senate to expel him.

As an additional reason, the court stated that the phrase "office of honor, trust, or profit under the Government of the United States" did not refer to offices the appointments to which are made by the State, and pointed out that Senators were chosen by the State legislatures. It would seem that this last statement of the Court was not necessary to the decision of the case, and it should further be noted that the case was decided before the adoption of the Seventeenth Amendment to the Constitution. Inasmuch as all the Senators joined in the petition in the present case, were elected by the

people and not by the legislatures of their States, it would seem that the reasoning of the Court is no longer applicable, and that the case is, in effect, no longer an authority, since there seems no ground for distinguishing a Senator from a Representative in Congress who, under the *Lamar case*, is an officer of the United States.

Earlier cases in the Supreme Court typified by *United States* v. *Germaine* (1878), 99 U. S. 508, and *United States* v. *Mouat* (1888), 124 U. S. 303, holding certain persons not "officers of the United States" within the meaning of certain statutes, contain language intimating that no one can be an "officer of the United States" unless he is appointed by the President, by the head of a Department, or by a court of law, because the Constitution prescribes these methods of appointment only. This line of cases does not seem determinative of the question in the present case because the court obviously had in mind executive and judicial officers and not legislative officers. In fact, these cases seem entirely inconsistent with the second *Lamar case* (1916), 241 U. S. 103, and it is settled by the first *Lamar case* (1916), 240 U. S. 60, above cited, that the question in the present case does not depend on the interpretation of the Constitution but is a mere question of statutory construction. It should also be noted that in the few cases in State courts in which the question has arisen, the holding has been that a Senator or Representative in Congress is not a State officer but is an officer of the United States. See

*State ex rel. Eaton* v. *Schmahl* (Minn. 1918), 167 N. W. 481; *State ex rel. Chandler* v. *Howell* (1918), 104 Wash. 99; *State ex rel. Spofford* v. *Gifford* (1912), 22 Idaho, 613; *Eversole* v. *Brown* (1899), 21 Ky. L. Rep. 925.

In view of the above considerations it is believed that since the adoption of the Seventeenth Amendment the *Lamar case* is controlling and that a member of either House of Congress is an officer of the United States within the meaning of such statutes as section 24 of the Judicial Code. It follows then that the present suit is brought by officers of the United States in so far as those petitioners who are Senators are concerned.

The petitioner, Jerry C. South, was appointed by the committee as an officer authorized to represent the committee and act as its attorney. (R. 6–g.) He took the usual oath of office. The Constitution vests in the Senate power to choose their officers, and customarily the power to choose such of their officers as are officers of the committees of the Senate, has been delegated to the respective committees, save in the case of the choice of chairmen of standing committees. In the case of the special select committee, such authority was specifically delegated through the authorization to employ "such assistants as may be deemed necessary by the committee." (S. Res. 227, 69th Cong.) The Constitution itself, in Article II, section 2, recognizes that officers of the United States may be appointed in a manner other than by the President, heads of de-

partments, or courts of law, as specified in the section. The consitutional authority of the Senate to choose its own officers is one such other method of appointment. It is therefore believed that the petitioner South is an officer of the United States in the Legislative Branch of the Government. In any event, the misjoinder of the petitioner South would not deprive the court of jurisdiction. See *Erickson* v. *United States* (1924), 264 U. S. 246.

(C) THE PETITIONERS ARE AUTHORIZED BY LAW TO SUE

The special select committee in the instant case was authorized by Senate Resolution 324, 69th Congress—

> * * * To take possession * * * and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books, and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

For the exercise of such authority the special committee by virtue of the above-cited resolution was—

> * * * vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

Among the powers of procedure provided by Senate Resolution 195, 69th Congress, is the power—

> * * * to require by subpœna or otherwise * * * the production of books,

papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

Invested with the above grant of authority, the committee through a duly authorized representative demanded from the respondents possession of ballot boxes and election papers but was refused. However, under the above grant of authority the Senate had made it possible for the committee to obtain relief from such contumacy without waiting for a session of the Senate to be held during which the contumacy of the local officers might be punished through contempt proceedings before the Senate or such officers certified for criminal prosecution under section 104 of the Revised Statutes.

The special select committee first attempted to make use of the power to issue its own subpœna, to be served and obedience thereto enforced by the Sergeant at Arms and such number of deputies as might become necessary. The failure of the Sergeant at Arms, however, made this means impossible of effective execution. The special select committee thereupon turned to its remaining sources of power, namely, the requiring of the production of books, papers, and documents by means other than its own subpœna and the doing of such acts as might be necessary in the matter of the investigation. In pursuance of that authority the special select committee instituted the present suit asking for the aid of the Federal courts.

The resolutions empowering the special select committee need not state in terms that the committee might institute suit. Such a power is implied from the powers to "require by subpœna or otherwise" and "to do all acts necessary." The committee is the agent of the Senate in conducting the inquiry. Under the ordinary principles of agency, authority "to do all acts necessary" to accomplish an end, or similar language, or authority to take possession of certain documents or papers includes the power to bring suit. *State ex rel. Giroux* v. *Giroux* (1894), 15 Mont. 137; *Briggs* v. *Yetzer* (1897), 103 Iowa 342; *Ryan* v. *Tudor* (1884), 31 Kan. 366; *Joyce* v. *Duplessis* (1860), 15 La. Ann. 242. See also *Citizens' National Bank of Kingman* v. *Berry & Co.* (1894), 53 Kan. 696; *Potter* v. *New York Infant Asylum* (1887), 44 Hun. (N. Y.) 367.

The authority to bring the present suit, drawn from the Senate resolution heretofore quoted, is vested in the special select committee by "law" within the meaning of that term as used in paragraph First, section 24, of the Judicial Code. When an executive agency, such as the Interstate Commerce Commission (see *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447), is empowered by law to resort to the courts to enforce its demands and orders, such law must be in the form of a bill that has passed both Houses and been submitted to the President. When the Senate, however, by law resorts to the courts or empowers a committee to resort to the courts, for the enforce-

ment of its demands, the action is taken in the form of a resolution. A resolution of the Senate is law if adopted in the execution of one of the separate constitutional powers of the Senate, such as its power to confirm appointments or ratify treaties, or its auxiliary power to conduct inquiries. In such cases the Senate is not dependent upon the action of the President or the House of Representatives. It is independent and its resolution is law and, within its proper sphere, is as final and binding as a statute.

The history of section 24, paragraph First, gives force to this contention. An earlier corresponding provision read—"of all suits in common law where the United States, or any officer thereof, under the authority of any Act of Congress, shall sue, although the debt, claim, or other matter in dispute shall not amount to one hundred dollars." 3 Stat. 245. The phrase "under the authority of any Act of Congress" was subsequently changed to "authorized by law." Revised Statutes, §563. Under this much broader phrase it would seem that not only officers authorized by Act of Congress but also officers authorized by the Constitution, by treaty, or by resolution of either House of Congress adopted in the exercise of their separate constitutional powers, were included.

(D) THE PRESENT SUIT IS NOT A SUIT AGAINST A STATE

Jurisdiction of the present suit in the District Court is not barred under section 233 of the Judicial Code, for the suit is not one against the State but one against local officers charged by the law of the

State with the performance of a plain official duty requiring no exercise of discretion. Such an officer is liable to be proceeded against by mandamus or injunction. This distinction has been made in cases arising under the Eleventh Amendment. *Board of Liquidation* v. *McComb* (1875), 92 U. S. 531, 541; *Huidekoper* v. *Hadley* (C. C. A. 8th Cir. 1910), 177 Fed. 1, writ of certiorari granted (1910), 218 U. S. 672, dismissed per stipulation of counsel (1911), 223 U. S. 735; *Rolston* v. *Missouri Fund Commissioners* (1887), 120 U. S. 390; *Graham* v. *Folsom* (1906), 200 U. S. 248. The same distinction seems to apply with equal force to section 233 of the Judicial Code.

Under the Pennsylvania election laws, officers to whom ballot boxes containing the tickets and other documents are entrusted, are required to keep the same "to answer the call of any persons or tribunal authorized to try the merits of the election" (Pamphlet Laws Pa. 1923, 147–8), or "to answer the call of any court or tribunal authorized to try the merits of the election" (Pamphlet Laws Pa. 1925, 103, 106). Pennsylvania courts have held that Pennsylvania tribunals are not authorized to try the merits of the election of a member of Congress. *Twentieth Congressional District Election* (1924), 281 Pa. 561; *Commonwealth ex rel. Parker v. Emminger* (1871), 74 Pa. 470; petition for certiorari denied (1925), 266 U. S. 635; *Ransley's Contested Election* (1920), 268 Pa. 303; *Twenty-Eighth Congressional District Nomination* (1920), 268 Pa. 313.

The present suit will compel the performance of the duty imposed upon the respondents by Pennsylvania law to answer the call of the tribunal authorized to try the merits of the election, namely, the Senate. The duty so enjoined upon these officials is purely ministerial and involves no exercise of discretion.

## III. Use of its Own Forces Not Exclusive Method of Enforcing Senate's Process

In the event of disobedience to a subpœna issued by the Senate or one of its committees for the personal appearance of witnesses or compliance with a subpœna *duces tecum*, the Senate may proceed *vi et armis* and through its own force, exerted by the Sergeant at Arms or his deputies, arrest the witness (*McGrain* v. *Daugherty* (1927), 273 U. S. 135), or seize the papers subpœnaed; or may through its own proceedings punish the contempt. These remedies are available whether the Senate is exerting powers of inquiry auxiliary to its functions regarding its membership (*Anderson* v. *Dunn* (1821), 6 Wheat. 204; *Marshall* v. *Gordon* (1917), 243 U. S. 521; Hinds' Prec. § 1604, § 1666, § 1669, and § 1671; S. Doc. 278, 53d Cong., 2d sess., p. 311), or whether it is exerting powers of inquiry auxiliary to its legislative functions (Hinds' Prec. § 1720 and § 1722; *McGrain* v. *Daugherty* (1927), 273 U. S. 135; unpublished opinion of Justice Hoehling in *Sinclair* v. *United States* in the Supreme Court of the District of Columbia, decided July 14, 1924; S. Rept. 142, 38th Cong. 2d sess., p. 20 of the "Journal of the Committee").

The above remedies, however, are not exclusive. If such remedies were exclusive, it could be only by reason of an implied constitutional prohibition preventing the Senate from resorting to the courts. It is not believed that any such constitutional prohibition can be implied.

The Senate, by means of the Act of January 24, 1857, entitled "An Act more effectively to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony" (11 Stat. 155; Rev. Stat. sec. 104), has provided for the enforcement of its subpœnas or those of its committees by making disobedience thereto a criminal offense. In *In re Chapman* (1896), 166 U. S. 661, the constitutionality of the statute was called in question. The court there said:

> Counsel contend with great ability that the law under consideration is necessarily subject to being impaled on one or the other of two horns of a dilemma, either inflicting a fatal wound. The one alternative is that the law delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases.
>
> We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in

> cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; * * *
>
> In our opinion the law is not open to constitutional objection * * * (pp. 671–2.)

If such legislation is constitutional, it must be because the use of the Senate's own force is not an exclusive method required by the Constitution for enforcing obedience to its subpœnas or those of its committees. The statute in question provided for resort to the courts through criminal proceedings. There seems no reason why resort to the courts might not also be availed of through equitable proceedings inasmuch as courts in equity have appropriate jurisdiction to aid the national Government in executing its constitutional powers. In the case of the Act of 1857, criminal proceedings are instituted by certificate of the President of the Senate presented to the District Attorney for the District of Columbia. In the case of equity proceedings in the present case, the authority to institute them devolves upon the special select committee by reason of the Resolution of the Senate directing the Special Committee to do such acts as may be necessary in the matter of the investigation. Such direction includes the power of bringing the suit, as has been demonstrated heretofore in this brief.

In case of the Executive branch of the Government, the use of its police and military forces is not the exclusive method of executing its powers of inquiry. The Congress has commonly provided that administrative agencies in the Executive branch of the Government may, in order to enforce their subpœnas, invoke the aid of the Federal courts. The invocation of such aid by means of petition for equitable relief in the form of an order directing obedience to the Executive subpœna, has been sustained as constitutional, and presents a case or controversy susceptible of judicial cognizance. *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447. If the Congress may provide by law for Executive resort to the courts of equity for enforcement of Executive subpœnas, it would seem an unjustifiable discrimination against a coordinate branch of the Government to deny that the Senate may by resolution provide for resort to the Federal courts in equity for the exercise of its separate constitutional powers.

Indeed, the Executive branch of the Government has, without the aid of statute, resorted to the Federal courts in equity for the execution of its powers and been sustained in such action by this court and commended for it. *In re Debs* (1895), 158 U. S. 564, 583. It is deserving of like praise that the Senate, instead of using force and deciding for itself the legal merits of the inquiry, should submit the determination of those merits to a judicial tribunal.

## IV. Continuing Status of the Special Select Committee

The Senate is a continuing body and has power to create standing or special committees that continue beyond the expiration of the Congress during which they are created. This point was expressly decided by this court in the case of *McGrain* v. *Daugherty* (1927) 273 U. S. 135, 181. Senator Lodge takes the same position in his work upon The Senate of the United States (p. 2), and many Senators, in discussing the continuing status of the rules of the Senate and of the former joint rules of the two Houses, have likewise urged that the Senate is a continuing body. (See remarks of Senator Bayard, 4 Cong. Rec. 431; Senator Sherman, 4 Cong. Rec. 433; Senator Morton, 4 Cong. Rec. 435; Senator Maxey, 4 Cong. Rec. 438; Senator Root, 52 Cong. Rec. 3792; Senator Poindexter, 55 Cong. Rec. 11; Senator Hoar, S. Doc. 26, 54th Cong., 2d sess., 4–5; see also, Senator Borah, R. 51; Senator Norris, R. 52; Senator Goff, R. 57.)

Furthermore, the respondents, themselves, before the lower courts admitted that the Senate is a continuing body and has power to create select committees that may continue to operate beyond the expiration of the Congress of their creation. The respondents agree that the only disputed question as to the status of the special select committee in the present case is, Did the Senate grant a continuing status to this particular committee? (R. 152.) The answer depends upon the proper construction of Senate Resolutions 195 and 324, 69th Congress. The petitioners are of

the opinion that these resolutions creating and empowering the special select committee did confer upon it a continuing status so that it might lawfully act after the expiration of the Congress during which it was created. In so construing the Resolutions the petitioners rely upon—

(1) The opinion of the President of the Senate;

(2) The decision of the Supreme Court in *McGrain* v. *Daugherty* (1927), 273 U. S. 135;

(3) The circumstances under which Senate Resolution 324 was adopted;

(4) The practice of the Senate.

Senator Borah (R. 51), Senator Norris (R. 52), and Senator Goff (R. 57) also held the same opinion as the petitioners upon the question of the continuing status of the committee.

(1) THE OPINION OF THE PRESIDENT OF THE SENATE

Under the Constitution the Vice-President is the presiding officer of the Senate. It is impossible for him to perform his duties without interpreting and applying the rules of the Senate. Under the resolution creating and empowering the special select committee the Vice-President was also specifically under duty of appointing the original members thereof. As a result of the resignation tendered by Senator Goff there was before the Vice-President for his decision the question as to whether the Vice-President was empowered to accept the resignation, appoint Senator Goff's successor, and as to whether the special select committee was

legally in existence so that a vacancy existed. As to the latter point the determination of the Vice-President accorded with the position taken by the petitioners. (See Appendix C to this brief.) It is submitted that, inasmuch as under the Constitution and the Senate rules of proceedings, there was imposed upon the Vice-President final authority to make the determination, his decision must be considered final until reversed by the Senate on appeal, and should be given the same weight as a judicial precedent when a similar question arises collaterally before the courts of the United States.

### (2) THE OPINION OF THE SUPREME COURT IN M'GRAIN V. DAUGHERTY

The *Daugherty case* involved a special select committee to investigate the administration of the Department of Justice. The original resolution creating the committee specifically limited it to action to be taken "during the Sixty-eighth Congress." R. 69; S. Res. 157, 68th Cong., 1st Sess., 65th Cong. Rec. 3299, 3409. Two weeks later, however, the committee was authorized "to sit and perform its duties at such times and places as may be deemed advisable or necessary by said committee." R. 73; S. Res. 189, 68th Cong., 1st Sess., 65th Cong. Rec. 4126. This language is substantially identical with that adopted with respect to the special select committee of which the petitioners are members. Senate Resolution 195, 69th Congress, creating that committee, states that "Said committee is hereby empowered to sit and act

at such time or times and at such place or places as it may deem necessary." The mere fact that in the *Daugherty case* the authority to sit at such times and places as may be deemed necessary was conferred by an amendatory continuing resolution and in the present case by the original resolution creating the committee is, it is believed, unimportant.

In construing the resolution involved in the *Daugherty case* this Court said:

> The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary * * *.
>
> So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order (pp. 180–1).

The above language of this Court, it is submitted, clearly indicates that the special select committee involved in *McGrain* v. *Daugherty* was in existence after the expiration of the 68th Congress and had continued in existence up to the time of the decision of this Court during the 69th Congress. True it is that the Court also said:

> But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or

> revived, will have all its original powers. This being so, and the Senate being a continuing body, the case can not be said to have become moot in the ordinary sense (pp. 181–2).

But the language last quoted did not deny the continued existence of the Senate special select committee as urged by the respondents. This Court stated that the committee had not made a final report, had not been discharged, and had not been continued by an affirmative order—in other words the committee was still in existence by reason of the resolution empowering it "to sit and perform its duties at such times and places as may be deemed advisable or necessary." It is believed that the meaning intended to be conveyed by this Court by the language last quoted from the *Daugherty case* may be paraphrased as follows:

> Whether or not it is agreed that the committee was made continuous, that point is not controlling upon the question whether the case has become moot, as the fact that the Senate could continue or revive the committee if it had expired would in any event keep the case from becoming a moot case.

In view of the opinion of the Court in *McGrain* v. *Daugherty* and the substantial identity of the language used by the Senate in empowering the committee involved in that case and the committee involved in the present case, it would seem this court's decision in the *Daugherty case* is controlling and that the special select committee has a continuing status.

(3) THE CIRCUMSTANCES UNDER WHICH SENATE RESOLUTION 324 WAS ADOPTED

Senate Resolution 324, 69th Congress (R. 6–d), specifically authorized the special select committee—

> * * * To take possession * * * and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

and further vested the committee—

> with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

Senate Resolution 195 (R. 6–a) among other procedural matters empowered the committee—

> to sit and act at such time or times * * * as it may deem necessary; * * *.

Senate Resolution 324 was adopted January 11, 1927, less than eight weeks before the session was required to terminate. It is inconceivable that the Senate could have expected the special select committee within this short time and during the closing weeks of a most crowded session to obtain possession of all the required ballot boxes and election papers. It is even more inconceivable that the Senate would not only expect the committee to take

possession of the ballot boxes and election papers but to "preserve" them for such a short period. Preservation implies at least the expiration of a reasonable period of time before the Senate would be prepared either by itself or through the Committee on Privileges and Elections or through any other committee to make appropriate use of the material obtained. The contested election case of *Wilson* v. *Vare* could not be decided during those eight weeks by the then membership of the Senate, nor was it so decided. In view of these circumstances it seems almost impossible to so construe the phrase "at such time or times * * * as it may deem necessary" as to limit the committee to a period of eight weeks as is demanded by the respondents. The phrase must be construed to mean what it literally and fairly says, namely, that the committee may sit at such times as it deems necessary. To give the construction to the phrase demanded by the respondents would mean that the Senate had been guilty of the futile act of placing upon its committee a task impossible of fulfillment in the time allowed and of directing the committee to "preserve" materials which the committee could not obtain before it expired and which even if obtained could have been of no effective use to the Senate before the committee's custody and right of possession would have terminated.

It seems apparent that if the Senate had intended the committee to go out of existence on March 4th, it would in the resolution have made provision for

the preservation of the materials after that date, by instructing the committee to turn them over to some other agency of the Senate. Certainly the ballot boxes and election papers should not be without a custodian after such date, and it is equally certain that the Senate could not possibly have intended that on March 4th the ballot boxes and election papers should be returned to the custody of the officials of the State of Pennsylvania.

While the Senate of the 69th Congress had full authority to investigate the Senatorial election in Pennsylvania, and to take possession of the ballots and other election papers and preserve the same, it is doubtful whether that Senate could hear and determine the Wilson-Vare contest. It would seem that the contest could not be decided by the Senate before the 70th Congress because it is for a term beginning with that Congress for which Mr. Vare claims he was elected Senator. It was therefore clearly the duty of the Senate of the 69th Congress, in view of the matters brought to its attention relating to the Senatorial election in Pennsylvania, to take possession of the ballots and election papers and preserve them until the convening of the 70th Congress and until the Senate might thereafter make a suitable order as to the disposition of the same.

The resolutions under which the special select committee was directed to proceed clearly contemplate that the ballots and election papers were to be taken possession of and preserved by the committee until

the Senate should, by appropriate action, determine what should be done with the same.

The Senate of the 69th Congress might well have been subjected to just criticism if, knowing of such contest and having before it charges of fraud in the election, steps were not taken through an agency, such as the special select committee, to obtain physical possession of the ballots and to preserve them until the arrival of the 70th Congress and thereafter until the Senate should discharge the committee from further responsibility in the matter.

### (4) THE PRACTICE OF THE SENATE

Directly contrary to its present practice the early history of the Senate shows that special committees rather than standing committees were the more usual type. The first standing committee provided for by the Senate rules was one on enrolled bills created in the 9th Congress. This was followed by a Committee on Audit of the Contingent Expenses in the 10th Congress and by the adoption of a rule in the 16th Congress providing for certain standing committees to be appointed at the commencement of each session. Save for changes in the number and designation of the standing committees, this rule continued until the 48th Congress when it was provided that standing committees should be appointed at the commencement of each Congress rather than at each session of the Senate. As so modified the rule still prevails as rule numbered XXV of the present Standing Rules of the Senate.

All the early Senate special committees, and practically all subsequent special committees save those in the most recent Congresses, were created without any specification as to their duration. They were not directed to report before a certain date; they were not specifically limited to a certain Congress nor to particular sessions or recesses; *nor were they unqualifiedly authorized to sit at such times as the committee might determine to be advisable.* Such special committees were at first considered as expiring with the session of their creation. This view accorded with the rule as to standing committees prevailing from the 16th to the 48th Congress. Subsequently such special committees were considered as expiring not later than the Congress of their creation. This view accorded with the change in the rule as to standing committees made in the 48th Congress.

In conformity with the above situation resolutions were commonly adopted by the Senate at the close of Congress from the 51st to the 63rd Congress continuing in existence both standing and select Senate committees from the expiration of the Congress to the commencement of the next regular session of the Senate. (R. 118–129.) Arguing from this fact the respondents contend that no special committee can continue in existence after the expiration of the Congress of its creation without the adoption of such a continuing resolution. This argument is without force, for the reason that these continuing resolutions continued only those Senate special committees which, by the resolutions creating them

or by subsequent resolutions, had not been specifically given a duration extending beyond the Congress of their creation. During the period from the 51st to the 63rd Congress there were created at very infrequent intervals Senate special committees specifically directed to report or to act during a subsequent Congress. But so far as has been discovered no Senate special committee during this period was authorized "to sit at such times as it deemed necessary." The continuing resolutions were also availed of from the 63rd Congress to the 66th Congress but limited solely to standing committees. (R. 130–4.) Special committees were excluded. The reason for the omission of special committees was not discussed on the floor of the Senate.

The history above discussed as to the practice of the Senate in nowise negatives the conclusion that the Senate has in the present case, by reason of its grant of authority to sit at such times as the committee might deem necessary and by reason of its imposition of continuing duties upon the committee, given the special select committee the power to act after the expiration of the Congress of its creation. The power of the Senate to so continue the committee is not disputed. The question remains one solely of interpretation of Senate Resolutions 195 and 324 of the last Congress; and there is no presumption that a special select committee as to which the Senate has used language indicating a continuing period of activity expires with the Congress of its creation. Such a presumption could

exist only in the case of a special select committee as to which the Senate has used no language whatever indicating a time for making a final report and no language relating to the sittings of the committee. The committee involved in the present case is not of such a character.

The respondents in order to give some effect to the words "sit and act at such time or times * * * as it may deem necessary," assert that the purpose of the words is to avoid the restriction imposed by the fifth paragraph of section XI of Jefferson's Manual to the effect that a committee of a parliamentary body may not without its consent sit while that body is sitting. It is quite true that the words do relieve from this restriction, but this is not their sole purpose. They relieve from all restrictions upon the sitting of the committee. They cover not only periods when the Senate is in session but also periods when the Senate is *in recess* either during or after termination of any session of a Congress. Indeed a common way of expressing the same idea is to state that the "committee may sit during the sessions or recesses of the Senate."

The introduction and failure of passage of Senate Resolution 364 (R. 11) do not indicate that either the special select committee or the Senate thought that the committee would expire at the end of the 69th Congress. In fact the consideration given to that resolution shows just the contrary. The chairman of the committee, Senator Reed of Missouri, stated:

"The purpose of the resolution is, first, to make it clear that the Senate committee will have the right to sit during the recess of Congress, a conclusion, I think, which follows from action heretofore taken, but I do not want any doubt about it; and, second, specifically to give the committee the right to examine the ballots so far as may be necessary. Our power already goes to the extent of examining the books and papers. We already have the ballot boxes here from the two sections of Pennsylvania which are principally involved, * * * but we can not systematically and with accuracy determine the matters that we must determine if we are to make a report to the Senate that shall mean anything unless we are allowed to go into these ballot boxes and to verify from them the returns that have been made. The purpose now is to confer that specific authority." (68th Cong. Rec., 4307.)

The committee asked for a grant of additional powers to open the ballot boxes and examine and tabulate their contents and to investigate elections in other States than Pennsylvania, together with a declaratory provision that the committee would continue, but limiting such continuance to December 30, 1927, instead of indefinitely. That the resolution was declaratory in respect of the committee's continuing existence after the expiration of the 69th Congress is further shown by the statement made on the Senate floor by Senator Borah. (68th Cong. Rec., 5530–1.)

(5) ACTION OF THE 70TH CONGRESS

The 70th Congress upon December 12, 1927, considered and agreed to Senate Resolution 10 which declared that the Resolutions creating and empowering the special select committee—

> have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.
>
> And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

Senate Resolution 10 should be treated as a declaration of the Senate's ratification and approval of the interpretation placed by the special select committee upon its authority. The resolution should serve to clarify beyond all doubt the disputed point as to the legal status of the committee during the period subsequent to the expiration of the 69th Congress. The difficulty that the lower courts found as to the judicial authority to interpret the Senate resolutions is certainly removed by the clarification of the point as to the committee's status, and that point is no longer present in the case. As a result, the primary question of the right of the committee to the present possession of the ballot boxes and election papers and the jurisdiction of the Federal

district courts in equity under section 24, paragraph First, of the Judicial Code, to aid the committee in obtaining such possession, are presented for decision without the necessity for interpreting Senate Resolutions.

CONCLUSION

The respondents have not in the lower courts seriously contested the jurisdiction of the Federal Courts over the present cause, on any ground other than that the special select committee has no legal existence permitting it to act after the expiration of the Sixty-Ninth Congress. The only other argument advanced at length against the jurisdiction of the District Court is that developed by the Court itself when it expressed its opinion that the rendition of judgment in the present cause would not constitute an exercise of judicial power in the Constitutional sense. That argument is of such a character that in the judgment of the petitioners it finds no basis in decisions of this court or any reasonable basis in logic.

As to the question of the continuing status of the committee, the respondents attempt to find in the practice of the Senate an explanation of the language used by the Senate in creating and empowering the special select committee, that denies to those words their fair and literal meaning. The explanation offered is believed to be without foundation. The full history of the development by the Senate of its practice with respect to its special select committees, contains nothing in conflict with the interpretation placed by the petitioners upon the language used

by the Senate, an interpretation which was in fact later confirmed by the Senate itself in Senate Resolution 10, 70th Congress. Furthermore, that interpretation is supported by the controlling decision of the Supreme Court in the *Daugherty case*, by the internal evidence of the resolutions, and by the circumstances under which the language was adopted and the purposes which the Senate intended the committee to accomplish.

The Legislative branch of the Government is coordinate with the Judiciary. In carrying out its constitutional powers the Legislative branch is not only entitled to the aid of the Federal Judiciary but, as this court has stated with respect to the Executive Branch, should be commended for resorting to such aid in lieu of its own legislative process and force alone.

The petitioners respectfully submit that the decree of the District Court should be reversed.

JAMES A. REED, *Pro se.*
CHARLES L. MCNARY, *Pro se.*
WILLIAM H. KING, *Pro se.*
ROBERT M. LAFOLLETTE, JR., *Pro se.*

GUY D. GOFF, *Of Counsel.*
LEVI COOKE,
*Of Counsel.*
FREDERIC P. LEE,
*Legislative Counsel, United States Senate.*
*Of Counsel.*
JERRY C. SOUTH,
*Pro se, and Attorney in Fact and Representative of the Committee.*

# APPENDIX A

## Statutes Involved

### 1. SECTION 24, PARAGRAPH FIRST, OF THE JUDICIAL CODE

The District Courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * *

### 2. SECTION 233 OF THE JUDICIAL CODE

The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction. * * *

### 3. PENNSYLVANIA STATUTES RELATING TO CUSTODY OF BALLOTS

As soon as the election shall be finished, the tickets, list of taxables, one of the lists of voters, the tally-papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges and clerks, shall all be carefully collected and deposited in one or more of the ballot-boxes; and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and judge of the election, and together with the remaining ballot-boxes shall, within one day there-

after, be delivered by one of the inspectors to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents (said justice of the peace to receive the sum of three dollars per year for one ballot-box, and an additional dollar per year for each additional ballot-box, for all services rendered in the care of the ballot-box or boxes placed in his custody, said sum to be paid by the county treasurer upon an order drawn by the county commissioners), to answer the call of any persons or tribunal authorized to try the merits of such election; and the other list of voters, tally-papers and certificates shall be enclosed by the said inspectors and judge in a sealed cover, directed to the prothonotary of the court of common pleas of the county, and shall by some one of them be delivered into his office within three days thereafter, where the same shall be filed.—[Pamphlet Laws, Pa. 1923, 147–8.]

* * * Whenever a place has been or shall be provided by the authorities of any city, county, township, or borough for the safekeeping of ballot boxes, the judge and minority inspector shall, after the election shall be finished, and the ballot box or boxes containing the tickets, list of voters and other papers have been securely bound with tape and sealed, and the signatures of the judges and inspectors affixed thereto, forthwith deliver the same, together with the remaining boxes, to the mayor and recorder of such city, or, in counties, townships, or boroughs, to such person or persons as the court of common pleas of the proper county may designate, at the place provided as aforesaid, who shall then deposit the said boxes and keep the same to answer the call of any court or tribunal authorized to try

the merits of such election. Whenever the election officers of any election district shall require the election boxes of such district, to hold any election which by law they are or shall be required to hold, they shall keep the same securely in their possession, without opening, until the morning of such election, and until they shall severally be sworn or affirmed not to disclose how any elector shall have voted, and, after being so sworn or affirmed, they shall open the said boxes, and burn and totally destroy all the ballots and other papers which they shall find therein, before proceeding to hold such election.—(Pamphlet Laws Pa. 1925, 103, 106.)

# APPENDIX B

## Senate Resolutions Relating to the Special Committee

### 69TH CONGRESS

#### Senate Resolution 195

[Sixty-ninth Congress, first session. S. Res. 195. In the Senate of the United States. April 5 (calendar day, April 8), 1926, Mr. Reed of Missouri submitted the following resolution, which was ordered to lie on the table. May 17 (calendar day, May 19), 1926, considered and agreed to]

*Resolved*, That a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive Republican, and of two members from the minority political party, shall be forthwith appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made

or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require by subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

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**Senate Resolution 227**

[69th Congress, 1st Session. S. Res. 227. In the Senate of the United States. May 21, 1926, Mr. Reed of Missouri submitted the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate. June 3, 1926, reported by Mr. Keyes, with an amendment; considered and agreed to]

*Resolved*, That the special Senate committee created pursuant to Resolution 195, agreed to the 19th day of May, 1926, hereby is authorized to employ steno-

graphic assistance, at a cost not exceeding 25 cents per hundred words, to report such hearings and proceedings as may be had in connection with any subject which may be before said committee and such clerical or other assistance as may be deemed necessary by the committee; that all expenses incurred, including costs of travel by the committee or their assistants, in furtherance of the purposes of said resolution, shall be paid out of the contingent fund of the Senate upon vouchers properly approved. The costs of this investigation shall not exceed $10,000.

---

**Senate Resolution 258**

[69th Congress, 1st session. S. Res. 258. In the Senate of the United States. June 23, 1926, Mr. Reed of Missouri, from the special committee created under S. Res. 195, reported the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate. June 30, 1926, considered, amended, and agreed to]

*Resolved*, That the limit of expenditure to be made under authority of Senate Resolution Numbered 227, agreed to June 3, 1926, be, and the same hereby is, increased from $10,000 to $50,000.

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**Senate Resolution 324**

[69th Congress, 2d session. S. Res. 324. In the Senate of the United States. January 10, 1927, Mr. Robinson of Arkansas submitted the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate. January 11, 1927, reported by Mr. Keyes, without amendment; considered, amended, and agreed to; preamble agreed to]

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the

election held on the 2d day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator from the State of Pennsylvania, and that unless preserved for the use of the Senate certain evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it in the State of Pennsylvania: Therefore be it

*Resolved*, That the special committee of five constituted under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, in addition to and not in detraction from the powers conferred in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure

of money, and intimidation of voters or other acts or facts affecting the result of said election.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony.

*Resolved further*, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee or any subcommittee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

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**Senate Resolution 364 (as introduced)**

[69th Congress, 2d session. S. Res. 364. In the Senate of the United States. February 17 (calendar day, February 21), 1927, Mr. Reed of Missouri submitted the following resolution, which was ordered to lie over under the rule]

*Resolved*, That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the Seventieth Congress.

That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

*Resolved further*, That the general authority of the said special committee is hereby extended to cover the nomination and election of any Senator at any general election held during the year 1926.

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**Senate Resolution 364 (as modified)**

[Calendar No. 1599. 69th Congress, 2d Session. S. Res. 364. In the Senate of the United States. February 17 (calendar day, February 21), 1927, Mr. Reed of Missouri submitted the following resolution, which was ordered to lie over under the rule. February 24, 1927, considered and ordered to the calendar. March 2, 1927, modified]

*Resolved*, That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion, and/or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and

scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

---

**70th CONGRESS**

[70th Congress, 1st session. S. Res. 2. In the Senate of the United States. December 5, 1927, Mr. Norris submitted the following resolution, which was ordered to lie over by unanimous consent. December 6 (calendar day, December 9), 1927, considered, amended, and agreed to; preamble modified and agreed to]

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceeding, and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee has reported the evidence which without substantial dispute shows that at the primary election at which the said William S. Vare is alleged to have been nominated as a candidate for the United States Senate there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare, and that there was spent in behalf of the said William S. Vare in said primary election, by the said William S. Vare and his friends, a sum of money exceeding $785,000; and

Whereas the said William S. Vare has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence taken by said committee is now and for many months has been on file in the Senate, and all of the said facts appear without substantial dispute; and

Whereas on the 10th day of January, 1927, there was filed in the Senate an official communication from the then Governor of Pennsylvania, made and delivered to the Senate in pursuance of law, the following certificate:

Commonwealth of Pennsylvania,
Governor's Office,
Harrisburg, January 8, 1927.

The President of the Senate of the United States,
Washington, D. C.

Sir: I have the honor to transmit herewith the returns of the election of United States Senator, held on November 2, 1926, as the law of this Commonwealth directs.

I have the honor also to inform you that I have to-day signed and by registered mail delivered to Honorable William S. Vare, a certificate which is as follows:

To the President of the Senate of the United States:

This is to certify that on the face of the returns filed in the office of the secretary of the Commonwealth of the election held on the 2d day of November, 1926, William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania a Senator from said State to repre-

sent said State in the Senate of the United States for the term of six years beginning on the 4th day of March, 1927.

The form of words customarily used for such certificates by the governors of this Commonwealth and the form recommended by the Senate of the United States both include certification that the candidate in question has been "duly chosen by the qualified electors" of the Commonwealth.

I can not so certify, because I do not believe that Mr. Vare has been duly chosen. On the contrary, I am convinced, and have repeatedly declared, that his nomination was partly bought and partly stolen, and that frauds committeed in his interest have tainted both the primary and the general election. But even if there had been no fraud in the election, a man who was not honestly nominated can not be honestly entitled to a seat.

The stealing of votes for Mr. Vare, and the amount and the sources of the money spent in his behalf, make it clear to me that the election returns do not in fact correctly represent the will of the sovereign voters of Pennsylvania.

Therefore, I have so worded the certificate required by law that I can sign it without distorting the truth.

I have the honor to be, sir,

Very respectfully yours,

GIFFORD PINCHOT, Governor.

Now, therefore be it

*Resolved*, That the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous

to the perpetuity of a free government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, and the charges of corruption and fraud officially made by the Governor of Pennsylvania, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate; and be it further

*Resolved*, That the claim of the said William S. Vare to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate within sixty days if practicable; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said William S. Vare be, and he is hereby, denied a seat in the United States Senate: *Provided*, That the said William S. Vare shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

---

**Senate Resolution 10**

[70th Congress, 1st Session. S. Res. 10. In the Senate of the United States. December 6 (calendar day, December 9). 1927, Mr. Reed of Missouri submitted the following resolution, which was ordered to lie over under the rule. December 12, 1927, considered and agreed to]

*Resolved*, That a resolution of the United States Senate agreed to on May 19, 1926, numbered Senate Resolution 195 of the Sixty-ninth Congress, first ses-

sion, creating a special committee to investigate expenditures in senatorial primary and general elections, and all subsequent resolutions dealing with the said special committee and agreed to by the United States Senate during the Sixty-ninth Congress (to wit: Senate Resolution 227, Senate Resolution 258, and Senate Resolution 324), have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.

And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

---

**Senate Resolution 68**

[70th Congress, 1st session. S. Res. 68. In the Senate of the United States. December 15, 1927, Mr. Shortridge submitted the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate. December 17, 1927, reported by Mr. Deneen, without amendment; considered and agreed to]

Whereas on the 4th day of March, 1927, the Senate referred to the Committee on Privileges and Elections the pending contest between William S. Vare and William B. Wilson involving the question whether the said Vare or the said Wilson, or either of them, is entitled to membership in the United States Senate as a Senator from the State of Pennsylvania: Now therefore be it

*Resolved*, That the Committee on Privileges and Elections is hereby authorized to hear and determine said contest and to take such evidence as it may

deem proper in order to determine the questions involved, and certify its conclusions to the Senate.

Said committee is authorized, by itself or by any subcommittee, to investigate the questions aforesaid, and shall have authority to act by or through such agents or representatives as it may see fit to designate.

Said committee or any subcommittee thereof shall have power to issue subpœnas and require the production of all papers, books, documents, or other evidence pertinent to said investigation, and said committee or any subcommittee thereof may sit during the sessions of the Senate and during any recess of the Senate or of the Congress, and to hold its sessions at such places as it may deem proper.

It shall have authority to employ clerks and other necessary assistance and to employ stenographers at a cost not to exceed 25 cents per hundred words, and to cause to be taken and recorded all evidence received by the committee, and to have said evidence printed for the information of the Senate.

The Senate having heretofore created a special committee to inquire into certain matters in connection with said election and the primary preceding the same, and having continued said committee in force, it is ordered that the Committee on Privileges and Elections may in its discretion consider such evidence as has heretofore or may hereafter be taken by the said special committee appointed pursuant to S. Res. 195, 223, 258, and 324, Sixty-ninth Congress, and S. Res. 10, Seventieth Congress; and the said special committee is hereby authorized in its discretion to consider such evidence as may be taken by the said Committee on Privileges and Elections."

The Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the said

Committee on Privileges and Elections or any subcommittee thereof, and to execute its directions.

The chairman of the committee and each and every member thereof is hereby empowered to administer oaths and generally have such powers and perform such duties as are necessary or incident to the exercise of the powers and duties imposed by this resolution.

Said committee shall report to the Senate at the earliest practicable date.

The cost of investigations and proceedings in pursuance of the foregoing to be paid out of the contingent fund of the Senate and not to exceed $50,000.

## APPENDIX C

### Text of Opinion of the President of the Senate

In connection with this matter of the resignation of Senator Goff from the senatorial investigating committee, appointed under Sen. Resolution 195 of the 69th Congress, and the appointment by me of a successor to him on that committee, legal arguments pro and con have been submitted to me involving the question as to whether the committee is still in possession of the powers which it had before the adjournment of Congress.

In my judgment the Supreme Court of the United States in the case of John J. McGrain, deputy sergeant-at-arms of the United States Senate, appellant, versus Mal. S. Daugherty, rendered January 17, 1927, conclusively disposes of the question in the affirmative. The Supreme Court was passing upon the powers of a senatorial committee authorized by a resolution "to sit and perform the duties at such times and places as may be deemed advisable or necessary by said committee."

It held that the language of the resolution extended the powers of the Committee beyond the Congress which passed the creating resolution. Senate Resolution 195, 69th Congress, creating the present senatorial investigating committee, contains the following language:

> Said Committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary.

The holding of the Supreme Court, therefore, in the Daugherty case is clearly applicable. The lan-

guage of the Supreme Court in the case was as follows:

> The investigation was ordered and the Committee appointed during the 68th Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the Committee's authority to the period of the 68th Congress, but this apparently was changed by a later and amendatory resolution authorizing the Committee to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual:
>
> "Neither house can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two houses. When done, it is by a bill constituting them commissioners for that particular purpose."
>
> But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives, whose members are all elected for the period of a single Congress, but it can not well be the same with the Senate, which is a continuing body, whose members are elected for a term of six years, and so divided into classes that the seats of one-third only become vacant at the end of each Congress.

In view of the above I have appointed Senator S. D. Fess of Ohio on said Committee in place of Senator Guy D. Goff, resigned.—The Evening Star, Washington, D. C., April 8, 1927, p. 1, column 4.

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101343—28

# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 744

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. King, Robert M. La Follette, jr., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and Jerry C. South, Attorney and Representative for the Said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, Petitioners,

*v.*

The COUNTY COMMISSIONERS OF DELAWARE COUNTY, Pennsylvania, the Prothonotary of Delaware County, and John J. Saling, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, Respondents.

## STATEMENT OF THE PETITIONERS PURSUANT TO DIRECTION OF THE COURT

### DIRECTION OF THE COURT

Upon the hearing on April 26, 1928, this court postponed the case until April 30, 1928, and directed

that counsel furnish to the court the facts as to the delivery to the Senate of ballot boxes and election papers relating to the election held in Delaware County, Pennsylvania, for the election of a United States Senator from the State of Pennsylvania on November 2, 1926, and other facts that may be necessary to determine whether the cause has become moot. In pursuance of the above direction this statement is submitted by counsel for the petitioners.

Counsel for the respondents has authorized counsel for the petitioners to state to this Court that it is a fact that there have been delivered to the United States Senate, and its committees and officers, from Delaware County, Pennsylvania, ~~70~~ no election boxes or ballots or election papers other than those listed as received by the Sergeant at Arms of the United States Senate in his affidavit, the original of which has been filed with the clerk of this Court and a copy of which is hereinafter set forth in this statement.

### DEMAND OF THE PETITIONERS

In their petition (R. 4–5) petitioners demanded possession of—

> All ballot boxes used in Delaware County in the General Election holden in the Commonwealth of Pennsylvania on the 2nd day of November, 1926, together with the contents of all boxes and * * * all ballots, return sheets, tally sheets, voters' lists, voters' check lists, ballot check lists and registration lists employed, used in and appertaining to said election * * *.

The above demand was made upon the county commissioners of Delaware County, the prothonotary of Delaware County, and John J. Saling, a justice of the peace of Upper Darby Township of Delaware County. Petitioners further prayed that when they were able to discover the names and identity of other justices of the peace and aldermen who had in their possession any part of the election paraphernalia mentioned in the commission of the attorney and special representative of the committee (R. 6–g), the court should order the names and official titles inserted in and to such final orders as the court may deem fit and proper to make (R. 6).

**TEMPORARY RESTRAINING ORDER**

The District Court on July 29, 1927, entered a restraining order decreeing that the county commissioners, the prothonotary, justice of the peace Saling, and other justices of the peace and aldermen of cities in Delaware County having custody of ballots used in the election, be enjoined and restrained pending the appeal in this case from—

(1) Delivering any of the contents of the ballot boxes to any of the election officers of Delaware County or to any other person whatsoever until further order by the court; and

(2) From burning or destroying any of the contents of the ballot boxes and from in any manner removing any of the contents of the ballot boxes from the jurisdiction of the court or of the Circuit Court of Appeals for the Third Circuit. (R. 174–175.)

**CONSENT DECREE**

Though not in the record for this case, counsel for the petitioners are informed that, upon the petition of William B. Wilson and with the consent of William S. Vare, the District Court entered a decree on September 16, 1927, in an entirely separate proceeding entitled "In re Contested Election for United States Senator for the State of Pennsylvania at the General Election held on November 2, 1926, No. 4187, June Session, 1927," to the following effect so far as Delaware County is concerned:

(1) That the United States marshal for the Eastern District of Pennsylvania was ordered and directed forthwith to take and impound all the ballot boxes containing the ballots, and all other election records and the papers relating thereto, which were used at the general election held on November 2, 1926, for a United States Senator.

(2) That in cases in which a duplicate set of boxes were not available for future use, the contents of all boxes were to be removed therefrom in the presence of the prothonotary of the Court of Common Pleas of the county and deposited in another receptacle to be kept with the ballot boxes as hereinafter provided and that there was to be attached to such other receptacle a tag containing a certificate of such prothonotary that such receptacle contained the contents of the box from which they were removed and the condition of the box prior to such removal.

(3) That the boxes and other receptacles were to be deposited and safely stored with the prothonotary.

(4) That the prothonotary was to hold and safely keep in his exclusive control and custody all of such boxes and receptacles to await and abide by the demand or request therefor by the Senate of the United States or the further order of the court.

(5) That the marshal was forthwith to notify the county commissioners and prothonotary in Delaware County to safely hold and keep all of the records, and all other papers not contained in such boxes relating to the said general election, in their possession, to await and abide by the demand or request therefor by the Senate of the United States or the further order of the court.

### AFFIDAVIT OF SERGEANT AT ARMS

The Sergeant at Arms of the United States Senate has prepared an affidavit setting forth the ballot boxes and election papers received by him from Delaware County. So far as counsel for the petitioners are informed, the Senate and its committees have received no ballot boxes or election papers for Delaware County from any source other than the Sergeant at Arms. Counsel for the petitioners certify that the following is a true copy of the affidavit of the Sergeant at Arms:

> DISTRICT OF COLUMBIA, *ss:*
>
> I, David S. Barry, Sergeant at Arms, United States Senate, being duly sworn, depose and say as follows:
>
> 1. On February 10, 1928, through my deputy, John J. McGrain, I made service personally upon A. J. Dalton, chief deputy to

the prothonotary of Delaware County, Pennsylvania, at the courthouse, Media, Pennsylvania, of a subpœna directed to William Ward, Jr., prothonotary of the County of Delaware, Pennsylvania, signed by Samuel M. Shortridge, chairman of the committee on privileges and elections of the United States Senate, commanding the prothonotary to deliver to the Sergeant at Arms of the United States Senate or to his representative all ballot boxes and contents of ballot boxes, together with unused ballots, return sheets, tally sheets, voters' lists, voters' check lists, ballot check lists, registration lists, poll tax lists, and other election records, and other papers relating thereto, which were used at the general election November 2, 1926, for a United States Senator, and were then in the prothonotary's possession under and pursuant to a decree of the United States Court for the Eastern District of Pennsylvania heretofore duly made and entered, or otherwise possessed by him.

2. In response to the subpœna above referred to, I have received from the prothonotary of Delaware County, Pennsylvania, through my deputy, John J. McGrain, the following:

7 metal ballot boxes.
166 containers (pasteboard cartons) into which the contents of other ballot boxes had been placed.
1 prothonotary's envelope.
39 voting check lists.
78 registration books.

5 ballot check lists.
168 return sheets.
1 general return sheet.
2 general certificates of result.

3. I failed to receive ballot boxes or packages containing contents of ballot boxes for Folcroft Borough; Haverford Township, 8th ward; Parkside Borough; Radnor Township, 4th ward; Chester City, 2nd ward, 2nd precinct.

DAVID S. BARRY.

Subscribed and sworn to before me, Charles F. Pace, a notary public in and for the District of Columbia, this 28th day of April, 1928.

CHARLES F. PACE,
*Notary Public, District of Columbia.*

My commission expires February 18, 1931.

**RECORDS OF SENATE COMMITTEES**

Though not in the record of this case, counsel for the petitioners are informed that the special committee and the committee on privileges and elections have in the course of preparation work sheets, tabulations, and notes as to the contents of the ballot boxes and other receptacles and the prothonotary's envelope and as to election papers received and missing. These records, however, are at present incomplete and counsel for the petitioners are informed that it is impossible to complete them within the time available for the preparation of this statement.

REQUIREMENTS OF PENNSYLVANIA LAW

Counsel for the petitioners are further informed that in accordance with the Pennsylvania law (see brief of petitioners, pp. 59–61) and practice thereunder, there should now be available for each election district in the county of Delaware a ballot box and election papers as follows:

I. In the case of an election district in the City of Chester:

1. Ballot box containing ballots cast and—

(*a*) List of voters.

(*b*) Tally paper.

(*c*) Set of oaths of election inspectors, judges, and clerks.

(*d*) Triplicate return sheet.

2. Two registration books.

3. Prothonotary's envelope containing duplicates of—

(*a*) List of voters.

(*b*) Tally paper.

(*c*) Set of oaths of election inspectors, judges, and clerks.

(*d*) Triplicate return sheet.

and accompanied by—

(*e*) Return sheet and stubs and unused ballots.

II. In the case of an election district outside the City of Chester:

1. Ballot box containing voting check list in addition to same contents as in case of election district in the City of Chester:

2. Prothonotary's envelope containing ballot check list in addition to same contents and accompanying papers as in case of election district in the City of Chester.

CONCLUSION

Though not in the record in this case counsel for the petitioners are informed that there are 178 election districts (boroughs, borough precincts, borough wards, townships, township precincts, township wards, and city precincts) in Delaware County, Pennsylvania. Comparing election papers that should now be available in accordance with the Pennsylvania law and practice thereunder and the election papers which the Sergeant at Arms under oath states that he has received, the counsel for the petitioners conclude as follows:

1. That there have not been delivered to the Senate or any of its committees or officers ballot boxes or packages containing the contents of ballot boxes for Folcroft Borough; Haverford Township, 8th ward; Parkside Borough; Radnor Township, 4th ward; or Chester city, 2nd ward, second precinct.

2. That there have not been delivered to the Senate or any of its committees or officers 177 of the 178 prothonotary's envelopes.

3. That on its face the Sergeant at Arms' affidavit would seem to indicate that there have not been delivered to the Senate or any of its committees or officers 134 of 139 ballot check lists, 100 of 139 voting check lists, and 9 of 178 return sheets. However, the accuracy of these last figures can not be asserted until such time as the committee summaries of the election papers found upon the opening of the ballot boxes received from Delaware County have been completed and made available.

4. That no statement can now be made as to the number of ballots missing.

The petitioners respectfully urge upon this Court that the possession of all ballot boxes and ballots and other election papers from Delaware County is necessary in order that the special committee can fully perform the duties imposed upon it by the Senate; that the number of missing ballot boxes and ballots and other election papers and the holders thereof can not be ascertained except in proceedings in which evidence may be presented and developed and process issued as in a trial court; that the explanations that may be submitted by the proper custodians of the ballot boxes and ballots and other election papers, to explain any failure to deliver can be adequately presented and contested only in proceedings before a trial court; and that such proceed-

ings can be had in the present case as the result of this court's deciding the questions of jurisdiction raised by the decree of the District Court and remanding the case for further proceedings before the District Court.

JAMES A. REED, *Pro se.*
CHARLES L. MCNARY, *Pro se.*
WILLIAM H. KING, *Pro se.*
ROBERT M. LA FOLLETTE, JR., *Pro se.*
GUY D. GOFF, *Of Counsel.*

LEVI COOKE,
*Of Counsel.*

FREDERIC P. LEE,
*Legislative Counsel, United States Senate.*
*Of Counsel.*

JERRY C. SOUTH,
*Pro se, and Attorney in Fact and Representative of the Committee.*

○

(24)

No. 744

FILED
MAY 8 1928
CHARLES ELMORE CROPLEY
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1927

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JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. KING, ROBERT M. LA FOLLETTE, JR., SENATORS CONSTITUTING A SPECIAL COMMITTEE OF THE UNITED STATES SENATE, ACTING UNDER THE AUTHORITY OF SENATE RESOLUTIONS NOS. 195 AND 324 OF THE SIXTY-NINTH CONGRESS, AND JERRY C. SOUTH, ATTORNEY AND REPRESENTATIVE FOR THE SAID SPECIAL COMMITTEE OF THE UNITED STATES SENATE, APPOINTED AND ACTING PURSUANT TO SENATE RESOLUTIONS NOS. 195 AND 324 OF THE SIXTY-NINTH CONGRESS, PETITIONERS,

*v.*

THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, THE PROTHONOTARY OF DELAWARE COUNTY, AND JOHN J. SALING, A JUSTICE OF THE PEACE, IN AND FOR DELAWARE COUNTY, AND ALL OTHER JUSTICES OF THE PEACE AND ALDERMEN OF CITIES OF DELAWARE COUNTY, PENNSYLVANIA, WHO HAVE CUSTODY OF BALLOT BOXES USED AT THE GENERAL ELECTION HELD IN DELAWARE COUNTY ON NOVEMBER 2, 1926, RESPONDENTS.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

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## STATEMENT OF THE RESPONDENTS PURSUANT TO DIRECTION OF THE COURT

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ALBERT J. WILLIAMS
*Counsel for Respondents.*

C. L. BAKER, PRINTER, MEDIA, PA.

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# In the Supreme Court of the United States

OCTOBER TERM, 1927

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No. 744

JAMES A. REED, CHARLES L. MCNARY, WILLIAM H. King, Robert M. La Follette, Jr., Senators, Constituting a Special Committee of the United States Senate, Acting Under the Authority of Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, and Jerry C. South, Attorney and Representative for the said Special Committee of the United States Senate, Appointed and Acting Pursuant to Senate Resolutions Nos. 195 and 324 of the Sixty-ninth Congress, Petitioners,

*v.*

The COUNTY COMMISSIONERS OF DELAWARE County, Pennsylvania, the Prothonotary of Delaware County, and John J. Saling, a Justice of the Peace in and for Delaware County, and All Other Justices of the Peace and Aldermen of Cities of Delaware County, Pennsylvania, Who Have Custody of Ballot Boxes Used at the General Election Held in Delaware County on November 2, 1926, Respondents.

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## STATEMENT OF THE RESPONDENTS PURSUANT TO DIRECTION OF THE COURT

The defendants admit that the facts set forth in the affidavit of David S. Barry, Sergeant at Arms, United States Senate, contained in the statement filed by the petitioners, are correct.

Annexed hereto and made a part hereof is (1)

a certified copy of a petition presented to the District Court of the United States for the Eastern District of Pennsylvania by William S. Wilson praying that Court to make an order impounding the ballot boxes of each election district in Delaware County, which were used at the General Election held on November 2, 1926, etc., (2) a joinder in said petition by William S. Vare, (3) a Decree of said Court ordering and decreeing that the prayer of the petition be granted and that the United States marshal for said district take and impound said ballot boxes and all other election records and other papers relating to said election and where a duplicate set of boxes was not available for future use, to remove the contents from the boxes and place them in other containers and (4) a return of the United States marshal to said order.

Said order is the explanation of the statement in the affidavit of the Sergeant at Arms that the contents of one hundred and sixty-six boxes were in pasteboard containers.

With respect to the statement in said affidavit that neither the ballot boxes nor packages containing contents of ballot boxes were received for five election districts, it appears by the return of the United States marshal that he was unable to locate three of said boxes and that the contents of the boxes for the other two districts were reported to the marshal as having been destroyed at the primary held in September, 1927, before the marshal was able to serve those having the custody thereof. The defendants never received or had control or custody of any of said five boxes or their contents and have no knowledge thereof.

Annexed hereto is an affidavit by William Ward, Jr., Prothonotary, with respect to the "Prothonotary's Envelopes" referred to in the affidavit of the Sergeant at Arms in which he states he received the envelopes from the election officers of the several election precincts and turned them over to the Court for tabulation, etc. With respect to "voting check lists," "ballot check lists" and "return sheets" of which the Sergeant at Arms states he received respectively only 39, 5, and 168, we have no knowledge or information as to the whereabouts of such of them as are missing, if any are missing. It would seem that some are missing, but it appears from paragraph 3 on page 10 of the petitioners' statement that they cannot now accurately state what are missing.

In conclusion we reiterate the statement made at the oral argument that we do not deny the right of the Senate, nor the Committee on Privileges and Elections nor the petitioners, now that the Senate has by resolution declared them to be still in force as a committee, to have anything they ask for relating to the election of November 2, 1926. When subpœnaed by the Sergeant at Arms to do so, we delivered to him everything which we were supposed to have in our possession, which we could locate, appertaining to said election. We have no desire to withhold anything and are not withholding anything, and will surrender anything else which may be discovered, but so far as we know we have already delivered everything that is in existence relating to said election.

HARRY M. BIRNEY, JR.,
JAMES M. HAMILTON,
THOMAS F. FEELEY,
JOHN J. SALING.

IN THE

# UNITED STATES DISTRICT COURT

FOR THE

# EASTERN DISTRICT OF PENNSYLVANIA

June Sessions, 1927 No. 4187

---

IN RE CONTESTED ELECTION FOR AN UNITED STATES SENATOR FOR THE STATE OF PENNSYLVANIA AT THE GENERAL ELECTION HELD ON NOVEMBER 2, 1926.

---

*To the Honorable, the Judges of said Court:*

The petition of WILLIAM B. WILSON respectfully represents:

1. That a contest is now pending before the Senate of the United States for a seat in that body from the State of Pennsylvania, as a result of the General Election held on November 2, 1926, for a term of six years, beginning on March 4, 1927.

2. That in said contest your petitioner is the contestant and William S. Vare is the contestee.

3. That the said contest was on March 4, 1927, referred to the Standing Committee on Privileges and Elections by the Senate of the United States.

4. That at the suggestion and request and with the approval of the said Standing Committee on Privileges and Elections of the Senate of the United

States, your petitioner and the contestee are agreed that all ballot boxes used in all the election districts of Pennsylvania in the election aforesaid, together with their contents, and all other official papers used in the said election, shall be kept and preserved intact, subject to the order or requisition of the Senate of the United States.

5. That the next session of the Senate of the United States will not begin until the first Monday of December next, unless a special session is called in the meantime by the President of the United States.

6. That a Primary and General Election will be held in the State of Pennsylvania between the date hereof and the first Monday of December next, and unless some order is made by your Honorable Court for the preservation of all the ballot boxes and all official papers contained therein, within the counties of this Judicial District, said ballots and other official papers contained in said ballot boxes will be destroyed on September 20, 1927, in accordance with the provisions of the election laws of the State of Pennsylvania,

WHEREFORE, your petitioner prays that a proper and sufficient order of your Honorable Court be made for the impounding of the ballot boxes of each and every election district within the counties of Delaware and Schuylkill of this Judicial District, which were used at the General Election held on November 2, 1926, or, if that is not practicable, of the contents thereof, to be placed in some other secure container under the direction of your Honorable Court, and that such order direct that the said ballot boxes and or their contents and all other official

papers used in the said election be preserved intact in some secure place to be designated by your Honorable Court, subject to the further order of your Honorable Court or to the order or requisition of the Senate of the United States of America.

And your petitioner will ever pray.

WILLIAM B. WILSON.

DAVID WALLERSTEIN,
CHARLES H. DOUGLAS,
ROWLAND B. MAHANY,
Atty. for William B. Wilson.

---

STATE OF PENNSYLVANIA }
COUNTY OF LAWRENCE } *ss:*

WILLIAM B. WILSON, being duly sworn according to law, deposes and says that he is the petitioner above named, that he has read the foregoing petition and the facts set forth therein are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 10th day
of September, 1927.

WILLIAM B. WILSON.

WILLIAM K. HUGUS,
*Notary Public.*
My Commission expires January 31, 1929.
(SEAL)

WILLIAM S. VARE asks that the Court make the order prayed for in the foregoing petition, saving all his rights and privileges in the trial of the said contest in the Senate of the United States.

He further avers that he was duly elected as a Senator for the State of Pennsylvania, at the General Election held on November 2, 1926, and that he was duly certified by the Governor of the State as having been so elected.

WM. S. VARE,
By FRANCES SHUNK BROWN, *Atty.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

June Sessions, 1927 No. 4187

IN RE CONTESTED ELECTION FOR A UNITED STATES SENATOR FOR THE STATE OF PENNSYLVANIA AT THE GENERAL ELECTION HELD NOVEMBER.

**DECREE**

AND NOW, September 16, 1927, upon consideration of the foregoing petition the Court orders and decrees that the prayer of the petitioner be granted and that in fulfillment and execution thereof W. Frank Mathues, the United States marshal for the Eastern District of Pennsylvania, is hereby ordered and directed forthwith to take and impound all of the ballot boxes containing the ballots and all other election records and other papers relating thereto which were used at the general election held on November 2, 1926, for United States Senator in the Election Districts in said Eastern District in the Counties of Delaware and Schuylkill, and that in all of said Counties in which a duplicate set of boxes is not available for future use that all of their contents be removed therefrom in the presence of the Prothonotary of the Court of Common Pleas of the County and deposited in another receptacle to be kept with the ballot boxes as hereinafter provided, and there shall be attached to such other receptacle

a tag containing the certificate of such Prothonotary that the said receptacle contains the contents of the box from which they were removed, and the condition of the box prior to such removal.

It is further ordered that the said boxes and other receptacles shall be deposited and safely stored, as follows:

Those from the County of Delaware, with the Prothonotary of the Court of Common Pleas of Delaware County at Media.

Those from the County of Schuylkill, with the Prothonotary of the Court of Common Pleas of Schuylkill at Pottsville.

It is further ordered that the Prothonotary of said Counties, each and every of them, shall hold and safely keep in their exclusive control and custody all of said boxes or receptacles to await and abide by the demand or request therefor by the Senate of the United States, or the further order of this Court.

It is further ordered that the said marshal shall forthwith notify the County Commissioners and Prothonotaries in each of said Counties to safely hold and keep all of the records, and all other papers not contained in said boxes relating to the said General Election, in their possession to await and abide by the demand or request therefor by the Senate of the United States, or the further order of this Court.

It is further ordered that all expenses connected with the taking and impounding, custody and safekeeping, be paid by the said petitioner.

J. W. THOMPSON,
*District Judge.*

At Chester, in my district, on September 16, 1927, served the within decree upon Harry M. Birney, Jr., President of the County Commissioners of Delaware County, by handing him a true copy thereof and making contents of the same known to him, at 12.00 o'clock midnight, and upon William Ward, Jr., Prothonotary of Delaware County, by handing him a like copy and making contents of the same known to him at 1.00 o'clock A. M. on September 17, 1927.

Also took the ballot boxes containing the ballots and all other election records and other papers relating thereto, which were used in 173 precincts of the said County at the General Election held on November 2, 1926, for United States Senator (173 boxes) and removed them to the Delaware County Court House at Media, where I left them in the custody of the said Prothonotary, abiding the further order of the Court.

In November, 1926, there were 178 voting precincts in Delaware County, and I found the boxes in all of the precincts except Folcroft Borough and Parkside Borough, which, I was informed, were destroyed before I could collect the same—due to the fact that the within decree came to me virtually on the eve of the primary election—and Haverford Township (Eighth Ward), Radnor Township (Fourth Ward), and Chester City, Second Ward, Second Precinct, which, after a diligent search, I have been unable to locate.

So answers,

W. FRANK MATHUES,
*United States Marshal,*
Per MILAS KELLY, *Deputy.*

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } *ss:*

I, George Brodbeck, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Petition of William B. Wilson for the impounding of certain ballot boxes, etc. Decree granting prayer of petition, filed September 16, 1927, and Return of Marshal as to service upon Harry M. Birney, Jr., President of the County Commissioners of Delaware County, in re contested Election for a United States Senator for the State of Pennsylvania at the General Election held November 2, 1926, No. 4187, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and
(SEAL) affixed the seal of the aforesaid Court at Philadelphia this 28th day of April A. D. 1928.

GEORGE BRODBECK,
*Clerk.*

By E. G. JOHNSON,
*Deputy Clerk.*

William Ward, Jr., being duly sworn according to law, deposes and says that he is the Prothonotary of the Court of Common Pleas of Delaware County, Pennsylvania;

That the envelopes containing the returns of the several election precincts in said County for the election held November 2, 1926, were duly delivered to him by the several election officers of said County, and were in turn delivered by Deponent to the Court of Common Pleas of said County for the purpose of tabulating said returns.

That the procedure in said Court is as follows:

The several returns are turned over to a Tabulating Board, appointed by the Court, which Board, in the presence of the Court, opens the envelopes and tabulates the returns contained therein.

The envelopes with their contents were never returned to Deponent. When demand therefor was made upon Deponent by the Sergeant at Arms of the United States Senate, the Deponent caused diligent search to be made for said envelopes and their contents but they have not been found and have been inadvertently mislaid, lost or destroyed. The tabulation made from said returns by the Tabulation Board in the presence of the Court and signed by the Tabulation Board and Court, were returned to Deponent's Office and have been delivered by Deponent to the Sergeant at Arms of the United States Senate. Annexed hereto is a true and correct copy of the receipt which was given to Deponent by the Sergeant

at Arms of the United States Senate, of what was delivered to him by Deponent.

WILIAM WARD, JR.,
*Prothonotary.*

Sworn and subscribed to
before me this 28th day
of April 1928. (SEAL.)

FLORENCE P. HALLMAN,
*Notary Public.*

Commission expires March 23, 1929.

COPY February 10, 1928.

Received from Mr. William Ward, Jr., Prothonotary of Delaware County, Pennsylvania, seven ballot boxes and packages containing contents of all ballot boxes of the Voting Precincts in said County, with the exception of Folcroft Borough, Haverford Township, Eighth Ward; Parkside Borough; Radnor Township, Fourth Ward; Chester City, Second Ward, Second Precinct. And other miscellaneous papers, pertaining to the Election of November, 1926.

JOHN J. McGRAIN,
*Deputy Sergeant at Arms,*
*United States Senate.*

No. 744

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1957.

James A. Reed, Chester I. Barney, William H. King, Robert H. La Follette, Jr., [illegible], a Special Committee of the United States Senate Acting Under the Authority of [illegible] Res. 198 and 304 of the [illegible] Congress, and Jerry G. Kloak, Attorney [illegible] the Said Special Committee [illegible] Kloak, Counsel and Agent [illegible] Resolutions Nos. 198 and 304 of the [illegible] Congress, Petitioners,

v.

The County Commissioners of Delaware County, Pennsylvania, the Prothonotary of [illegible] County, and John J. Kelley, Sheriff of [illegible] County, in and for Delaware County, [illegible] of the Peace and Aldermen [illegible] Pennsylvania, Who [illegible] County, Bail at the General [illegible] Held in Delaware County on November 5, 1956, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENTS.


Samuel A. Williams,
Media, Pa.,
*Attorney for Respondents.*



Rodgers & Lyle, 308 Bonbright Bldg., Phila., Pa. Cable Address: Rodgers.

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## STATEMENT OF QUESTIONS INVOLVED.

1. Is the case moot?

2. Had the District Court jurisdiction under the judicial code, which involves the questions whether this is a suit brought by

(a) the United States or

(b) any officer thereof authorized by law to sue.

---

## COUNTER STATEMENT.

The last sentence in the second paragraph of petitioners' statement (page 7 of their brief) that "The respondents failed and refused to comply with this demand (for the ballot boxes and their contents &c.) and continue to do so" is not accurate in so far as it states that the respondents "continue to do so". They are not now refusing.

---

## STATEMENT OF WHAT HAS TRANSPIRED SINCE THE DECISION OF THE DISTRICT COURT.

On September 16th, 1927, William B. Wilson presented a petition to the District Court for the Eastern District of Pennsylvania, in which William S. Vare joined, setting forth that a contest between the petitioner and Mr. Vare was pending before the United States Senate for a seat in that body; that said contest was on March 4th, 1927, referred by the Senate to its standing Committee on Privileges and Elections; that at the suggestion and request and with the approval of said committee, the peti-

tioner and Mr. Vare were agreed that all ballot boxes used at the election held November 2nd, 1926, and their contents and all other official papers used in said election should be kept and preserved intact, subject to the order or requisition of the Senate, and praying said Court to make an order impounding said ballot boxes, or that the contents thereof be placed in some other secure retainer under the direction of said Court, and that said order direct said ballot boxes and/or their contents and other official papers used in said election be preserved intact in some secure place (pages 4 to 7 inc. of statement filed by Respondents pursuant to direction of this Court).

Pursuant to said petition said Court made an order granting the prayer of the petition and directing the United States Marshal for said district to take and impound all the ballot boxes containing the ballots and all other election records and other papers relating to said election, and, where there was not a duplicate set of boxes available for future use, that all of their contents be removed therefrom in the presence of the Prothonotary and deposited in another receptacle to be kept with the ballot boxes. It further ordered that said boxes and other receptacles should be deposited and safely stored with the Prothonotary, and that the Prothonotary should hold and keep the same in his custody and control. It further ordered that the Marshal should notify the County Commissioners and the Prothonotary to safely hold and keep all of the records and all other papers not contained in the ballot boxes relating to said election to await and abide by the demand or request therefor by the United States Senate (pages 8 and 9 of Statement filed by respondents pursuant to direction of this Court).

Pursuant to said order the United States Marshal served a copy of said order on the Commissioners and Prothonotary of Delaware County on September 16th, 1927, and took the ballot boxes in 173 of 178 election dis-

tricts and removed them to the Court House of Delaware County, where he left them in the custody of the Prothonotary. He reported that he found the boxes in all but five election districts, that in two of those districts he was informed that the contents of the boxes had been destroyed before he could collect them, due to the fact that the order of Court had come to him virtually on the eve of the 1927 primary election, and that the other three he was unable to locate after diligent search (page 10 of statement filed by the respondents pursuant to direction of this Court).

On February 10th, 1928, the Sergeant-at-Arms of the United States Senate served upon William Ward, Jr., Prothonotary, a subpœna signed by the Chairman of the Committee on Privileges and Elections of the United States Senate commanding him to deliver to the Sergeant-at-Arms of the Senate or his representative all ballot boxes and contents of ballot boxes together with unused ballots, return sheets, tally sheets and other election records of the general election held November 2nd, 1926.

Pursuant to said subpœna, the Prothonotary delivered to the Sergeant-at-Arms 7 metal ballot boxes and 166 containers (pasteboard cartons) into which the contents of other ballot boxes had been placed, and other election papers and records specifically set forth in the affidavit of the Sergeant-at-Arms of the Senate on pages 6 and 7 of the statement filed by the petitioners pursuant to direction of this Court. He failed to receive ballot boxes for the five election districts mentioned in the Marshal's return

On the convening of the 70th Congress the Senate passed a resolution, No. 10 First Session 70th Congress (page 71 of Petitioners' Brief) declaring the resolution creating the committee in question and the resolutions extending its powers "have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of the body"—"And that the said special committee . . . shall

continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise directs".

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## ARGUMENT.

### *Is the Case Moot.*

When Mr. South appeared before the County Commissioners and the Prothonotary and handed to them a copy of the letter marked Exhibit C (R 6-g) they did not deny the right of the Senate or a duly authorized committee of the Senate to have that demanded; they merely challenged the right of the particular committee, Mr. South represented, because its right to function after the expiration of the 69th Congress had been challenged on the floor of the Senate and by the Sergeant-at-Arms and chairman of Committee to Audit and Control the Contingent Expenses of the Senate. Though it does not appear of record, the Commissioners replied to his demand by a letter of which the following is a copy:

March 25th, 1927.

Honorable Jerry South.

Dear Sir:—

We are in receipt of paper, marked copy of an order of the Special Committee of the United States Senate Investigating Expenditures in Senatorial Primary and General Elections, authorizing and directing you as the representative of and attorney for said committee, to take into your possession and securely seal all ballot boxes, ballots, return sheets, tally sheets, etc., in Delaware and other counties in Pennsylvania, appertaining to the general election held in Pennsylvania on November 2nd, 1926.

As the right of said Committee to take the ballot boxes and other paraphernalia appertaining to said election, has been questioned, and, to the extent that we are the custodians of said paraphernalia, we are responsible therefor under the laws of Pennsylvania, we feel we should be protected by an order of our Court directing us to deliver into your possession the paraphernalia we have, before delivering the same to you.

On such an order being made, we will gladly comply.

Yours truly,
Harry M. Birney, Jr.,
James M. Hamilton,
Thos. F. Feeley,
County Commissioners.

AJW/GS

The petition to the District Court for the Eastern District of Pennsylvania followed. As it was questionable whether under the judicial code, that Court had jurisdiction, a motion to dismiss the petition for want of jurisdiction was filed as well as an answer. The Court ordered that argument on the motion to dismiss be postponed and that taking of testimony be proceeded with (R 27-28). That was done and evidence adduced to show that it is not the practice of the Senate to recognize and that it does not recognize its special committees as continuing in force after the expiration of the Congress in which they are appointed, unless so authorized either by the resolution creating them or by a continuing resolution. It was conceded that the Senate is a continuing body and may continue its committees if it so desires.

The Court dismissed the petition for want of jurisdiction, not on the grounds on which the motion to dismiss was based, i. e., that it had not jurisdiction under the code, but on the ground that under the constitution it is

for the Senate to construe its own resolutions, and therefore the question was a legislative and not a judicial question.

Since then the following has transpired:

1. The respondents have delivered to the Sergeant-at-Arms of the Senate, pursuant to a subpœna of the Committee on Privileges and Elections of the Senate, all the ballot boxes and their contents and all other election records, which they had in their possession and could be found at the time of the service of the subpœna upon them.

2. The Senate itself has determined the Status of the petitioners as a committee, by the passage of Res. 10 of First Session of 70th Congress (page 71 of Petitioners' Brief).

It will be seen therefore that the questions which impelled the respondents to refuse the demand when made upon them, and the question decided by the District Court have been eliminated from the case. And furthermore, that the respondents have to the best of their ability delivered to the Sergeant-at-Arms of the Senate the subject matter of the litigation. There is no real controversy between the parties. The respondents have in the most practical manner recognized the right of the Senate through one of its duly authorized committees to demand and receive the ballot boxes and their contents and other papers and records appertaining to said election. Though some of them are missing the right to them is not denied; they have simply been lost or destroyed.

Though the question as to the status of the petitioners as a committee of the Senate has been eliminated, and further argument of that question would seem to be useless, yet as the petitioners have printed their argument below on that question, we have too at the end of

this argument (infra page 14) but solely for the purpose of showing, as we believe, that there were substantial grounds for questioning the status of the committee.

All that remains is the academic question as to whether the District Court had jurisdiction under the code.

That a case will be dismissed where there is no actual controversy, involving real and substantial rights, between the parties to the record, and that the fact that there is no actual controversy between the parties to the record may be allowed to be shown at any time before the decision of the case, are principles so well established that the citation of authority therefor would seem to be unnecessary, but as illustrations we cite:

Little vs. Bowers, 134 U. S. 547;
Mills vs. Green, 159 U. S. 651;
Williams vs. Hagood, 98 U. S. 72;
People of California vs. San Pablo & Tulare R. R. Co., 149 U. S. 308.

## HAD THE DISTRICT COURT JURISDICTION UNDER THE JUDICIAL CODE.

"Of all the courts which the United States may, under "the general powers, constitute, one only—The Su- "preme Court—possesses jurisdiction derived im- "mediately from the constitution, and of which the "legislative power cannot deprive it. All other courts "created by the general government possess no juris- "diction, but what is given them by the power that "creates them, and can be vested with none but what "the power ceded to the general government will au- "thorize them to confer."

United States vs. Hudson, et al., 7 Cranch 32 (3 L. E. 259), cited in U. S. vs. Maxwell, 135 Fed. Repts. 189.

"As regards all courts of the United States inferior "to this (supreme) tribunal, two things are necessary "to create jurisdiction, whether original or appellate. "The constitution must have given to the Court the "capacity to take it, and an act of Congress must have "supplied it. Their concurrence is necessary to vest "it. It is the duty of Congress to act for that pur- "pose up to the limit of the granted power. They "may fall short of it, but cannot exceed it. To the "extent that such action is not taken, the power lies "dormant. It can be brought into activity in no "other way."

The Mayor and Alderman, etc., vs. Smith, 6 Wall 247 (18 L. E. 851).

The subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal as may be authorized by Acts of Congress.

Kentucky vs. Powers, 201 U. S. 1 (50 L. E. 633).

It is conceded that if the District Court had jurisdiction it is to be found in the following portion of paragraph 1 of Section 24 of the Judicial code:

"The District Courts shall have original jurisdiction as follows:—

First: Of all suits of a civil nature, at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue . . . ".

Thereby, two questions are raised (1) is this a suit brought by the United States, (2) or by any officer thereof authorized by law to sue.

## IS THIS A SUIT BY THE UNITED STATES?

The petitioners argue that the United States is the real party in interest. *But that is not the question. The question is, is the suit brought by the United States?* Certain it is, it is not brought in the name of the United States. It is fundamental that the United States should have the right to determine when and by whom litigation shall be instituted, to enforce its sovereignty and protect its interests. Has it done so?

R. S. Sec. 767—Sec. 1294 of U. S. Compiled Statutes (1916) provides "there shall be appointed in each district . . . a person learned in the law to act as attorney for the United States in such district."

R. S. Sec. 771—Sec. 1296 of U. S. Compiled Statutes (1916) provides: "It shall be the duty of every District Attorney to prosecute in his district . . . all civil actions in which the United States are concerned."

> "Civil suits in the name and for the benefit of "the United States are . . . instituted by the Dis- "trict Attorney, he controls the prosecution of same "in the district and circuit courts . . . "
>
> "Settled rule that those courts will not recognize "any suit, civil or criminal, as regularly before them "if prosecuted in the name and for the benefit of the "United States, unless the same is represented by the "District Attorney or some one designated by him to "attend to such business, in his absence, as may ap- "pertain to the duties of his office."
>
> Confiscated Cases, 74 U. S. 454.

Where a bill in Equity stated that it was brought by the United States at the relation of a certain party, and did not state that the United States brought it by their district attorney, and was subscribed by certain other persons as solicitors for the plaintiff and the prayer of it

was that certain letters patent of the United States issued to the defendant might be surrendered to be cancelled: Held on demurrer to the bill, that it was bad, as not stating a case which entitled the United States to the relief sought.

U. S., ex rel, West vs. Doughty, Federal Cases 14986.

No power is conferred by statute or usage, on the courts of the United States to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the Statute.

United States vs. McAvoy—Feleral Cases 15654, cited in Confiscation cases, 74 U. S. 454 (supra).

In United States vs. Rosenthal, 121 Federal Reports 862, decided in 1903, it was held that the Attorney General, the Solicitor General, nor any officer of the Department of Justice is authorized to conduct, or to aid in the conduct of proceedings before a grand jury, nor had a special assistant to the Attorney General such power.

Evidently to meet that decision, the Act of June 30th, 1906, Sec. 534 of United States Compiled Statutes (1916) was passed which provides that:

"That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, when thereunto specially directed, by the Attorney General may conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now or

hereafter may be by law authorized to conduct, whether or not they be residents of the district in which such proceeding is brought."

R. S. Section 361—Sec. 536 U. S. Compiled Statutes (1916) provides: "The officers of the Department of Justice, under the direction of the Attorney General shall . . . on behalf of the United States . . . conduct and prosecute or defend all suits and proceedings in the Supreme Court . . . in which the United States, or any officer thereof, as such officer, is a party or may be interested."

Congress has therefore designated who shall act for the United States in instituting and prosecuting suits in its name and to protect its interests.

The Senate is no more exempt from these acts than any other branch of the Government, though the petitioners argue that they are on pages 27 to 29 inclusive of their brief.

In the exercise of its prerogatives by its officers and process, the Senate may act without let or hindrance, but when it applies in the name of the United States to the judicial branch of the government for assistance in the enforcement of its powers, there is no good reason why it is not just as amenable to the law it helped to create, prescribing what officer and department shall institute and conduct all suits by the United States, as any other branch of the government. In the course of their argument, the petitioners on pages 28 and 29 of their brief, in effect, challenge the right of Congress to deny the Senate the right to choose whom it will to represent it in its resort to the Courts in aid of one of its separate powers under the constitution. Therein they lose sight of the fact that such a suit if maintainable at all must be a suit by the United States and not by the Senate. The basic thought underlying this argument is the true one, i. e., that the petitioners do not view this as a suit by the United States

but as a suit by the Senate or rather a committee of the Senate to be controlled and conducted by the Senate.

The petitioners also argue on page 27 of their brief that it is immaterial that the suit was not brought in the name of the United States, citing Benton vs. Woolsey (1838) 12 Peters 27 and Jecker vs. Montgomery (1855) 18 Howard 110. In the Benton case the suit was brought in the name of the District Attorney for the United States and was so entitled. The question as to whether it was properly brought in that way was not raised by counsel but the Court raised it and seemed to have very serious doubt about it. But it passed the question in view of the fact that the question was not raised and the suit was brought by the District Attorney for the United States, and because it appeared that that was the usual and common form in which to bring such a suit in the State of New York, where the suit was instituted. In Jecker vs. Montgomery, the question was not raised either, until after a trial on the merits. For that reason, and because it appeared of record that the suit was brought by Public authority of the United States and the decree pronounced in the case was in favor of and in the name of the government, the Court refused to hold that the irregularity was fatal. Here the question was raised.

In the case at bar the suit was not brought in the name of the United States, was not instituted and conducted by either the District Attorney or any officer of the Department of Justice; it lacks all the ear marks of a suit by the United States and in fact and in name is not a suit by the United States, but by the members of a committee of the Senate and that is all. Even their status as a committee of the Senate was in question until the passage of Senate resolution No. 10, 70th Congress (page 71 of Petitioners' Brief).

## IS THIS A SUIT BY AN OFFICER OF THE UNITED STATES AUTHORIZED BY LAW TO SUE.

At the oral argument we questioned whether the term "officer" as used in the Act applies to a Senator, and contended that it should be restricted to "officers" within Sec. 2, Art. 2 of the Constitution, citing

U. S. vs. Germaine, 99 U. S. 508.

On reflection we have concluded that the primary question to determine in a given case, is whether authority has been given by law to sue. If so, and the one to whom the authority is given, is an officer of the United States, even though not within Sec. 2, Art. 2 of the Constitution, he would seem to be within the meaning of the Act. We will therefore discuss the question from that standpoint.

The Petitioners claim the resolutions in question are an authorization "by law" to sue. They claim that within the Senate's sphere of action its own resolutions are laws and as binding as a Statute, and that this is an instance where it may do that. We challenge that and submit it is not tenable.

It must be conceded that the Senate cannot of its own motion create power. All its powers are derived from the Constitution or Act of Congress. It cannot enlarge upon those powers nor vest greater powers in its committees. When it passes a resolution to conduct an inquiry and appoints a committee to conduct it, it does not create power; it but delegates to the committee a power inherent in the Senate. This must be so. Thereunder neither the Senate nor House can do singly what Congress can.

In short, if the Senate has not power to sue it cannot legally grant such a power to one of its committees. Can the Senate sue? How would it sue? By joining all the members? It is not a legal entity and therefore

could not sue in corporate capacity. It is manifest the Senate cannot sue. No provision has been made for it to do so, nor any machinery provided for it to do so. What it cannot do, it cannot enable one of its committees to do. Hence it cannot by law authorize any of its members to sue. Therefore, the resolutions in question are not an authorization by law to sue.

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## ARGUMENT BELOW IN SUPPORT OF THE CONTENTION THAT THE PETITIONERS CEASED TO BE A COMMITTEE OF THE SENATE ON THE EXPIRATION OF THE 69th CONGRESS.

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### STATEMENT OF FACTS AS TO PRACTICE OF SENATE WITH RESPECT TO CONTINUING ITS COMMITTEES BEYOND THE EXPIRATION OF CONGRESS.

1. From the 51st Congress to the 62nd Congress inclusive, the Senate, just prior to the termination of each Congress, passed a resolution continuing all its standing committees and select committees until the next regular session of Congress (see certified copies of the resolutions on pages 118 to 129 inclusive of record).

2. From the 63rd Congress to the 66th Congress inclusive, it passed, just prior to the termination of each Congress, a resolution continuing all its standing committees, but not its select committees, until the next regular session of Congress or their successors should be duly elected (see certified copies of the resolutions on pages 130 to 133 inclusive of record).

3. Prior to the 66th Congress, rule XXV of the Senate,

relating to standing committees, provided that "The . . . standing committees shall be appointed at the commencement of each Congress."

4. During the 66th Congress, Rule XXV was amended by adding thereto the present Section 2, which provides: "The said (standing) committees shall continue and have power to act until their successors are appointed." (see page 114 of Record.)

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## STATEMENT OF FACTS GERMANE TO INSTANT CASE.

1. The resolution providing for the Committee in question (Senate Resolution 195) was first presented on April 5th, 1926, and was considered and agreed to May 17th, 1926. (See Exhibit A on page 6 A of Record.)

2. It provided for the appointment of a special committee of five to investigate moneys, etc., contributed, and promises, etc., made to influence the nomination of any person for membership in the Senate or to promote the election of any person as a member of the Senate at the general election to be held in November, 1926. (See Exhibit A on page 6 A of Record.)

3. James A. Reed, Charles L. McNary, William H. King, Robert M. La Follette and Guy D. Goff were appointed on said committee.

4. On November 2, 1926, a General Election was held in Pennsylvania for the election of a United States Senator and several state officers. William B. Wilson was the Democratic candidate and William S. Vare was the Republican candidate for United States Senator. William S. Vare was elected and given a certificate of election.

5. Prior to January 8th, 1927, Mr. Wilson presented a petition to the Senate contesting Mr. Vare's election. (See Exhibit B and recital therein on page 6 D of Record.)

6. On January 10, 1927, Mr. Robinson introduced a resolution that the Special Committee of five constituted under resolution No. 195 be authorized and empowered to take possession of the ballot boxes and other election paraphernalia used in the Senatorial election held in Pennsylvania on November 2, 1926, and to take and preserve all evidence as to the various matters alleged in Mr. Wilson's petition contesting the election, etc. Said resolution was referred to the Committee to Audit and Control Contingent Expenses of the Senate. (See Exhibit B on page 6 D of Record.)

7. On January 18, 1927, it was reported back, considered and agreed to. Exhibit B annexed to the petition is a copy of the resolution. (See Exhibit B on page 6 D of Record.)

8. On February 21, 1927, Mr. Reed chairman of committee in question (appointed under Resolution 195) presented a resolution to have inter alia, the committee continued during the interim between the 69th and 70th Congress and thereafter until the 30th day of December, 1927, but it did not pass. (See Resolution on pages 36 and 37 of Record.)

9. Following the presentation of the last mentioned resolution a filibuster ensued which lasted until the adjournment of the Senate and the expiration of the 69th Congress on March 4, 1927. The filibuster prevented the resolution ever coming up for a vote and prevented the passage of some very important legislation (Admitted by Appellees in the Court below—Record 180.)

10. On March 4, 1927, Mr. Robinson presented a petition of Mr. Wilson contesting Mr. Vare's election, and requested that it be received, printed in the record and referred to the committee on Privileges and Elections, whereupon the Vice-President announced that "without objection the petition will be received, printed in the record and referred to the Committee on Privileges and Elections", (admitted by Appellees in Court below—Record 181). Exhibit A annexed to answer of the County Commissioners is a copy of the petition; it appears on page 14 of Record. (See pages 40 and 41 of Record.)

11. Since the expiration of the 69th Congress, Senator Keys, Chairman of the Senate "Committee to Audit and Control the Contingent Expenses of the Senate" denies that the Reed Committee is in force, and has refused and still refuses to approve its vouchers for expenditures, and the Sergeant-at-Arms of the Senate has refused to attend the committee and execute its orders (pages 43 and 44 of Record).

12. On March 26, 1927, Senator Goff resigned from the Reed Committee (Admitted by Appellees in Court below—Record 180).

13. On or about April 7, 1927, Vice President Dawes appointed Senator Fess on the Committee to fill the vacancy caused by Senator Goff's resignation; but Senator Fess declined the appointment and issued a statement that in his opinion the committee expired with the 69th Congress (Admitted by the Appellees in Court below—Record 181).

14. Section 1 of Rule V of the Rules of the Senate provides:

"No Senator shall absent himself from the service "of the Senate without leave" (Record 180)

## CONTENTION OF APPELLEES.

We concede that the Senate is a continuous body and may continue its committees beyond the termination of the Congress in which they are appointed, but we contend that the Senate does not intend its committees to continue and they do not continue in force beyond the termination of the Congress in which they are appointed unless the Senate expressly so directs either in the creating resolution or by a continuing resolution—in other words where a creating resolution providing for the appointment of a committee contains no expression as to how long it shall continue in force, nor that it shall continue in force beyond the termination of the Congress in which it is appointed, such committee expires with that Congress, even though there be nothing in the resolution so limiting the life of the committee.

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## ARGUMENT IN SUPPORT OF CONTENTION OF APPELLEES.

We submit there is no other construction to be put on the above cited practice of the Senate of passing resolutions, just prior to the termination of each Congress from the 51st to the 62nd Congress inclusive, continuing all select and standing committees, and of passing resolutions just prior to the termination of each Congress from the 63rd to the 66th Congress inclusive, continuing all standing Committees, and the above cited amendment to Senate Rule XXV providing that all standing committees, should have "power to act until their successors are appointed",

This amendment and the resolutions continuing all standing committees are particularly significant, for the Senate is and at and prior to the said amendment was a continuous body, and its standing committees, at and prior to the amendment, were a part of its organization. Its

rules prior to the amendment, provided that its standing committees should be appointed at the commencement of each Congress. One might well think that when appointed they would continue until their successors were appointed, without any express resolution or rule to that effect. Why should they die with Congress? They were not committees of Congress, but of the Senate. And yet in the opinion of the Senate they did not continue without a rule or resolution to that effect.

As further evidencing the opinion of the Senate on the point under discussion, Senator Walsh said in the course of debate in the Senate, with reference to one of the above referred to resolutions:

> ". . . the adoption of the resolution immediately suggests that it was the opinion of the Senate that the committees would die unless some action was taken continuing them" 65 Cong. Rec. 16.

The following facts and circumstances further bear out this view:—

1. Mr. Reed, chairman of the committee in question, introduced a resolution to continue it.

2. Mr. Keys refused to approve vouchers for the committee's expenditures.

3. The Sergeant-at-Arms of the Senate refused to attend the committee and execute its orders.

4. Mr. Fess refused to accept an appointment on the committee because he believes it is dead.

It is true the appellants argue in their brief that it was not the purpose of the resolution introduced by Mr. Reed to continue the committee nevertheless, the first paragraph of the resolution reads:—

"Resolved that the Senate resolutions numbered 195, 227 and 258 of the Sixty-ninth Congress, first session, and Senate Resolution numbered 324 of the Sixty-ninth Congress second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the thirtieth day of December, 1927." (page 36 of Record.)

And when the resolution was introduced Mr. Reed said inter alia "The Purpose of the resolution is, first, to make clear that the Senate Committee will have the right to sit during the recess of Congress, a conclusion, I think, which follows from the action heretofore taken, but I do not want any doubt about it". To say the least, this indicated that Mr. Reed thought there might be "a doubt about it". The resolution did not come to a vote and was not passed because of a filibuster against it.

With respect to Mr. Keyes, his refusal to approve vouchers amounted to more than a mere opinion of an individual Senator. As chairman of the "Committee to Audit and Control the Contingent expenses of the Senate", he was visited with a responsibility as an officer of the Senate. To say the least he must have sincerely believed the committee was without power or he would not have refused as an official of the Senate to approve its vouchers.

And so with reference to the Sergeant-at-Arms. Resolution No. 324 expressly directs him to attend upon the committee and execute its orders. It was his plain duty to do so if the Committee was in force. And yet he refused. When called upon by the Committee to act, he was confronted with the responsibility of making a correct decision. He did not arbitrarily refuse. To the contrary he said to the committee in a letter:

"I cannot carry out your directions until I have had "time to consult with those whose opinions should "have legal weight."

"I have no desire to hamper the work of demanding, "collecting and forwarding to Washington, of the "ballots from the four Counties in Pennsylvania, and "will, with pleasure, do so when told by legal authori- "ties that I am authorized to do so." (page 44 of Record)

As he is still refusing, the implication is, that he has been advised the committee is without power. It is unbelievable that he is acting in defiance of a committee he believes or is advised, is in force. We must give him credit for that.

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## REPLY TO APPELLANTS' ARGUMENTS THAT THE COMMITTEE IN QUESTION IS STILL IN FORCE.

Appellants recognizing the burden that rests upon them advance the four following affirmative arguments in support of their contention that they are still a live committee:

1. The opinion of the President of the Senate.
2. The decision of the Supreme Court in McGrain vs. Dougherty (1927) 273 U. S. 135.
3. The circumstances under which Senate Resolution 324 was adopted.
4. The practice of the Senate.

In our reply we will take these up in the reverse order in which they are set forth.

## REPLY TO ARGUMENT ADVANCED BY APPELLANTS IN THEIR BRIEF UNDER "THE PRACTICE OF THE SENATE".

In the course of their argument under this head Appellants say that the Appellees argue that no special select committee can continue in existence after the expiration of the Congress of its creation without the adoption of a continuing resolution (page 52 of their brief). That is not our contention and was not in the Court below. We there contended as we are contending here, that in order for a select committee to continue there must be language in the creating resolution so authorizing or else a continuing resolution. There was no continuing resolution in the instant case. Therefore the authority for the continuance of the committee must be found, if at all, in the creating resolution.

The argument of the appellants resolves itself to this: that it is to be found in the authorization contained in Senate Resolution 195 empowering the committee to "sit and act as such time or times and at such place or places as it may deem necessary". This they say did not appear in the earlier resolutions of the Senate. We have nothing before us showing this but the assertion of the fact by the appellants in their argument, but even so, it will appear from the following resolutions that the expression does not relate to the duration of the life of a committee.

For instance the resolution creating the Crop Insurance Investigating Committee provides,

> ". . . within six months after the adoption of this resolution, the committee shall report to Congress the results of its investigations."
>
> "Such Committee is authorized to hold hearings at such time and places as it may deem advisable." (Record—132)

The resolution creating the Reforestation Investigating Committee provides—

> "The Committee shall make a final report of its in-
> "vestigations . . . not later than April 4, 1924 . . .
> "The Committee is authorized to sit at such times
> "during the Sessions or recesses of the 67th and 68th
> "Congresses . . . as it deems necessary." (Record—
> 136)

The resolution creating the Great Lakes—Gulf of Mexico Waterway Committee provides—

> ". . . The Committee shall make a final report not
> "later than May 1, 1924, . . . The Committee is au-
> "thorized to sit and act at such times during the
> "Sessions or recesses of the 67th and 68th Congresses
> ". . . as may be necessary." (Record—138)

The resolution creating the Gold and Silver Inquiry Committee, authorizes the Committee—

> "To sit during the sessions, recesses or adjournments
> "of the 67th and 68th Congresses." (Record—140)

The resolution creating the Bureau of Internal Revenue Investigating Committee, authorizes the Committee—

> "To sit during the sessions and recesses of the 68th
> "Congress." (Record—142)

The resolution creating the War Finance Corporating Investigation Committee authorizes the Committee—

> "To sit during the sessions and recesses of the 69th
> Congress." (Record—143)

Now it will be noted that notwithstanding the resolutions in these several illustrations contain a provision

specifically limiting the duration of the life of the committee, yet they also provide the committees may "hold hearings" or "sit and act", and like expressions "at such times and places" or "at such times", etc., as the respective committees "may deem advisable" or "necessary" and the like. Clearly then such expressions do not relate to the life of the committees, for that is expressly prescribed. In the Court below we contended that the purpose of such expressions is to obviate the provision of paragraph 5 of section XI of Jefferson's Manual which provides:

> "So soon as the houses sits, and a committee is noti-
> "fied of it, the chairman, is in duty bound to rise in-
> "stantly, and the committee to attend the service of
> "the house."

and section 1 of Rule V of the rules of the Senate, which provides:

> "No Senator shall absent himself from the service
> "of the Senate without leave."

The appellants concede "that the words do relieve from this restriction" (see page 54 of their brief), but they say "this is not their only purpose. They relieve from all restrictions upon the sitting of the committee. They cover not only periods when the Senate is in session, but periods when the Senate is in recess either during or after termination of any session of a Congress". (Ibid.)

Appellants cite no precedent for this last proposition nor any authority other than McGrain vs. Daugherty and the President of the Senate, each of which will be referred to later. The contention is their contention pure and simple. It is most remarkable that they cannot point to a single instance in which the senate has ever gone on record as holding that the authorization "to sit at such times and

places'' as a committee sees fit means that the committee may function after the termination of the Congress in which it is created. If there is such a precedent, there would have been no occasion for Mr. Reed to introduce Senate Resolution No. 364, to clear up the ''doubt'', as he put it.

Nor is it conceivable, in view of the fact that the Senate does not intend its Select Committees to continue in force beyond the termination of the Congress in which they are appointed, unless it says so, that it should use a term to express such intention, which, as shown by the above illustrations and conceded by Appellants has another and entirely different meaning.

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## REPLY TO THE ARGUMENT ADVANCED BY APPELLANTS IN THEIR BRIEF WITH RESPECT TO ''THE CIRCUMSTANCES UNDER WHICH SENATE RESOLUTION 324 WAS ADOPTED''.

In reply to the argument advanced under this head we would call attention to the fact that the committee did, before the expiration of the 69th Congress, take possession of all the ballot boxes and other election paraphernalia in the Cities of Allegheny and Philadelphia. That which they are now seeking to take is insignificant in comparison with what they did take. There was ample time for them to have taken what they are now asking for, had they been diligent. Therefore, it is not clear that there was not ample time for them to have taken possession of that which they are now asking for, had they been diligent. It is not necessary to determine whether they could or not. The thought we would emphasize is the uncertainty which would be involved in determining the life of a committee on such a basis. Each case would have to be determined on whether the work of a committee could be

done within the life of the Congress in which it was appointed or not. Needless to say, there would be a vast difference of opinion about that. The Senate might think it could—the committee might not. If a court should find with the committee, it would continue its life, in spite of the Senate. Thus the courts and not the Senate would determine the life of its committees. Is it to be believed that if the Senate realized that a particular committee could not perform its duties before the end of the Congress in which it is appointed, that it would leave it to be inferred that it was to continue? Surely not. Therefore, we are forced to the conclusion in the instant case, that the Senate either gave no thought at all as to whether the committee could finish its work or not, or if it did, that it believed it could be done. We therefore, submit there is no force in the contention that the direction "to take possession . . . of," etc., taken in connection with the fact that there was less than eight weeks to take possession, justified the implication that the committee was to continue.

Turning to the words "to preserve", it is argued that "Preservation implies at least the expiration of a reasonable period of time before the Senate would be prepared either by itself or through the committee on Privileges and Elections or through any other committee to make appropriate use of the material obtained." . . . Conceding for the sake of argument that this is so, still why should the committee be continued in force?

The "appropriate use of the material obtained" would be to use it in connection with Mr. Wilson's petition contesting Mr. Vare's election. One of the final acts of the Senate in the 69th Congress was to refer that contest to the committee on privileges and elections. As its name applies, it is the logical committee to whom it should have been referred; it is a standing committee and by virtue of the rules of the Senate is alive. There is then

and at the close of the 69th Congress there was a committee ready to make use of whatever material the Reed Committee had obtained. Why then should the Reed Committee be longer continued in force "to preserve"?

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## REPLY TO THE ARGUMENT ADVANCED BY APPELLANTS IN THEIR BRIEF UNDER "THE DECISION OF THE SUPREME COURT IN McGRAIN vs. DAUGHERTY.

We fail to see how this case has any hearing. The defendant, Daugherty, did make the contention that the question was moot, because the Congress in which the committee in that case had been appointed, had expired. It does not appear that there was any evidence presented as to the practice of the Senate with reference to appointing and continuing its committee. There was nothing before the Court to show that the authorization "to sit at such times and places as a committee sees fit" does not relate to the life of a committee. The contention seems to have been based on the bald proposition, that the Committee did not continue beyond the Congress in which it was appointed because the Senate was without power to continue it. The Court held the Senate is a continuous body and can continue its committees. That we concede. It is true that the Court, after stating that the original resolution limited the Committee's authority to the 68th Congrees, went on to say, "but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary". But it is evident that it did not intend to definitely and positively decide that the mandatory resolution did continue the Committee, for it went on to say:

"But be this as it may, it is certain that the Committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense."

Nor was it necessary for the Court to decide the point as to whether the amendatory resolution continued the committee. Seemingly all that the Court did was to venture an opinion as to what was meant by the amendatory resolution, and then said, "But be that as it may", the question is not moot. There was no evidence before it to show: (1) that notwithstanding the Senate is a continuous body and can continue its committees, it does not intend they shall unless it says so; (2) that is customary to incorporate in a creating resolution the authorization "to sit at such times", etc., to relieve against the above cited restriction requiring committees to attend upon the service of the Senate when it is in session; and (3) that the authorization is to be found in creating resolutions where the life of a committee is specifically prescribed, and it does not relate to the life of a committee. The opinion should not be construed as intending to lay down a rule of interpretation binding upon the Senate in other cases, particularly when there was no occasion to do it.

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## REPLY TO ARGUMENT ADVANCED BY APPELLANTS IN THEIR BRIEF UNDER "THE OPINION OF THE PRESIDENT OF THE SENATE".

It is argued by Appellants that because the Vice President as president of the Senate, appointed Mr. Fess to fill the vacancy caused by Mr. Goff's resignation, that that is a ruling by the President of the Senate that the com-

mittee is in force, and is binding until reversed by the Senate. If it be true that the rulings of the Vice President as president of the Senate are controlling when he is presiding over the Senate, that is not so when the Senate is not in session. Resolution No. 195 which vested him with authority to appoint the original committee, did not vest him with authority to fill vacancies on the committee. Section 1 of Rule XXIV of the Senate provides:

> "All other committees shall be appointed by ballot un-
> "less otherwise ordered; and a plurality of votes shall
> "appoint."

Therefore the President of the Senate did not have authority to appoint Mr. Fess. He seems to have aforewards realized it for his right to make the appointment was challenged immediately after he made it, and he has not assumed to make another appointment since. Therefore the appointment amounts to no more than an unofficial opinion of an individual Senator.

Furthermore, it will appear from his opinion on page 78 of Appellants' brief, that it is based entirely on a misconception of the opinion in the McGrain-Daugherty case.

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## OPINIONS OF SENATORS BORAH, NORRIS AND GOFF, WHICH APPEAR RESPECTIVELY ON PAGES 51-52 AND 57 OF RECORD.

When we turn to the opinions of the above mentioned Senators, we find that in so far as they relate to the power of the committee to function since the adjournment of Congress, they base their opinions on the Daugherty case. They utterly ignore the practice and precedents of the Senate, itself, and seem to think that the only question involved is whether the Senate has the power to continue its Committees. Thus Mr. Borah says—

"As I understand, your Committee has never made a final report, has never been discharged and that being the case, it seems to me under the decision of the Supreme Court in the Mal Daugherty case, you have all the authority to proceed you ever had." (page 52 of Record.)

And Mr. Norris says:

"One of the questions you propounded is whether the adjournment of Congress on the Fourth of March had, of itself, nullified all the authority given to the Committee and thus terminated the life of the Committee. The question involved is whether the Senate has authority to grant to a Special Committee the power to act and to continue its labors beyond an adjournment caused by the expiration of the terms of the members of the House of Representatives and one-third of the terms of the Senators. The question therefore, is: 'Is the Senate a continuing body? Does it expire like the House of Representatives, or does it and its organization continue without interruption'? The Senate has always acted on the theory—That it was a continuing body and that the expiration of one-third of the terms of its members every alternate Fourth of March, did not, of itself, deprive the Senate of this attribute. The Supreme Court of the United States, in McGrain vs. Daugherty, has recently decided this identical question."

He then proceeds to quote from the opinion in that case, the part with which we are familiar. (Pages 54-55 and 56 of Record.)

Senator Goff does not refer to the Daugherty case in his opinion, but he bases his opinion on the proposition that "the Senate is a continuous body". (Pages 57 and 58 of Record.)

Now the question is not whether the Senate is a continuous body. We repeat the Senate has always so considered itself. It is odd that these Senators should seize upon the Daugherty case with such avidity when it is so easily distinguishable. Senator Norris in the course of his opinion asks "Does . . . it (the Senate) and its organization continue without interruption"? and then proceeds to say it does There is no doubt but that the Senate itself is continuous, but if its organization is, why, we ask again, did not the Standing Committees continue prior to the amendment of the rule? Why was an express resolution necessary to continue them, before that. They were a part of its organization. There was nothing in the rules expressly limiting their life to the duration of the Congress in which they were appointed. If they did not continue, why do Select Committees continue unless they are expressly authorized to do so. And why did the Senate for years, take the pains to expressly provide they should continue. All this is passed over by the Senators in their opinions.

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## CONTRA OPINIONS OF SENATORS REED OF PENNSYLVANIA AND FESS OF OHIO.

Appended hereto on pages 32 and 34 respectively are opinions by Senators Reed of Pennsylvania and Fess of Ohio, in direct conflict with those of the above referred to Senators. They are referred to (1) because they support the arguments advanced above with respect to the precedents and practice of the Senate, and (2) as showing that all Senators are not in accord with Senators Borah, Norris and Goff.

ALBERT J. WILLIAMS, ..
*Attorney for Respondents.*

## STATEMENT OF DAVID REED OF PENNSYLVANIA.

The Special Committee of the Senate which has been investigating the campaign funds of Republican Senators has, in my judgment, no authority whatever at the present time. Eloquent arguments have been published recently to demonstrate that the Senate has power to continue such committees through the recess. No one has doubted the existence of this power of the Senate. The plain fact is that the Senate has not exercised its power to continue this particular Committee.

The recent decision of the United States Supreme Court in the Daugherty case did not decide that the Committee continued in power after the expiration of the Congress but merely decided that the Senate as a continuing body has power to continue its committees through the recess when it saw fit to do so. The Court said:

> "So far as we are advised, the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect and if continued or revived, will have all its original powers."

Apparently this language was not called to the attention of the Vice President.

The Senate has thirty-three "standing" committees and it has ordained that these committees shall continue with full power throughout all adjournments. If this Special Investigating Committee were considered also to be a "standing" committee, the rules of the Senate become meaningless. It has been the practice of the Senate

throughout its existence to regard these special committees as dying with the Congress in which they were appointed, unless the Senate shall affirmatively provide otherwise. If this is not the rule, then hundreds of special committees appointed in the past are still in existence and our Vice Presidents have been remiss in not keeping their membership filled. This, in my judgment, illustrates the unsoundness of the contention which is now made by those who would like to see this Campaign Funds Committee continue its attacks upon Republican Senators.

The strenuous but unsuccessful efforts made by Democratic Senators to pass the Resolution continuing this special committee and their willingness to sacrifice the Appropriations Bill and the Public Buildings Bill in the contest testify eloquently to their real thought. They know that the committee would expire if it was not affirmatively continued. It is useless now to argue that the Senate has power to continue its committees; the power is unquestioned, but it was not exercised.

The whole question is now up for a judicial decision. In my judgment, all parties concerned should await that decision before attempting further action.

If, as seems clear, the Committee is dead, then there are no vacancies to be filled by the Vice President. But even if the committee were still in existence, the Senate has not given authority to the Vice President to do more than designate the original five members of the committee. Under the rules of the Senate, any vacancies must be filled by election by the Senate itself. Furthermore, the presiding officer of the Senate must act when presiding at a Senate session. When the Senate is not in session, he has no authority whatever. Therefore, I regard the attempted appointment of Senator Fess as a nullity.

## STATEMENT OF SENATOR FESS.

When honored by the Vice President's appointment to the so-called slush fund committee to succeed Senator Goff, resigned, I took the matter of acceptance under advisement, because of the respect due the Vice President and the importance of the matter itself, realizing that immediate action was unnecessary now that the status of the committee is before the Courts for decision.

My inclination from the first has been to decline the appointment but being willing to submerge my desires if public service could be rendered, I have considered it from that angle.

My vote was not cast for the resolution creating this select committee for the reason that all necessary investigation should be made by the standing committee created for the purpose, but after the select committee was established and had started its investigations in the Pennsylvania and Illinois primaries, I stated in the Senate the evening before adjournment that I would vote for the resolution continuing the select committee if it were limited to complete the work already begun, but that I did not like to have a committee remain at the beck and call of someone who may wish to make a charge, whether it be a responsible or irresponsible charge—set up as it were a grand jury and make public the information that every Tom, Dick and Harry may come in and state his charge. Although there may be no call for it at all, yet because it is news, all the papers run it in large type at the head of the printed page, and the character of the men against whom the charge is leveled is injured—it may be blackened. The investigation may prove there was no foundation in it, but the mud sticks to him, and the truth never catches up with the falsehood. That is what I do not like.

I stated then that I have the fullest sympathy with

the desire to prevent corruption, politically as well as otherwise; and I have no sympathy whatever with any effort to conceal anything that is wrong in public life or elsewhere, but believe that investigation should be made in orderly fashion by a quorum of a properly recognized committee, and that if prosecution is necessary, it be done in judicial fashion.

After consideration I am of the same opinion that the investigations should be made by the regularly constituted standing committee of the Senate, and that no committee should be clothed with carte blanche authority to rove at will, and conclude that not being in accord with the recently expressed views of the majority of the committee, I could render no public service and should decline to serve on it, and have written the Vice President, thanking him for the designation, and giving reasons for my declination.

Upon reaching home last Saturday I received Vice President Dawes' telegram advising me of my appointment. I also had a letter from Senator Curtis, our Floor Leader, suggesting that I accept. These demanded careful thought.

Heretofore select committees of either Senate or House created for service during a Congress have ceased to exist at the conclusion of the Congress. It has been the custom in like circumstances. Senator Reed of Missouri on February 21, 1927, introduced S. Res. 364 to continue the force of the Investigating Committee during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

The Resolution was not referred to the Committee to Audit and Control the Contingent Expenses of the Senate, of which I am a member as the former resolutions has been, because this resolution did not call for an appropriation, the purpose being, if the resolution were

adopted, to use the funds remaining available under authority of the previous resolutions.

The Resolution was considered on the Floor and ordered to the Calendar, but did not reach a vote.

As a member of the Committee to Audit and Control the Contingent Expenses of the Senate, I have taken the position that there is no authority for that committee to approve expenditures of the Special Investigating Committee.

Whether the committee now exists is a matter of difference of opinion to be settled finally by the Supreme Court. It would be inconsistent for me to accept service as a member of this committee, while I have withheld approval of vouchers to meet expenses of such committee at a time when I have felt the committee had no authority.

# SUPREME COURT OF THE UNITED STATES.

No. 744.—October Term, 1927.

James A. Reed, Charles L. McNary, William H. King, et al., Petitioners, *vs.* The County Commissioners of Delaware County, Pennsylvania, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 28, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

The petitioners brought this suit in the United States court for the eastern district of Pennsylvania. The court held it was without jurisdiction and dismissed the case. 21 F. (2d) 144. The Circuit Court of Appeals adopted its opinion and affirmed the decree. 21 F. (2d) 1018.

Petitioners maintain that the district court had jurisdiction under the first paragraph of § 24 of the Judicial Code, U. S. C. Tit. 28, § 41, which provides that the district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue . . ."

Petitioners, other than South, are United States Senators and constitute a special committee created by Senate Resolution 195 passed May 19, 1926, to make investigation of means used to influence the nomination of candidates for the Senate. The Resolution empowered the committee "to require by subpoena or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation."

At a general election held in Pennsylvania November 2, 1926, William S. Vare and William B. Wilson were opposing candidates for the United States Senate. Vare was given the certificate of election and Wilson initiated a contest. Thereafter, January 11, 1927, the Senate passed Resolution 324. It recites that Wilson charges fraudulent and unlawful practices in connection with Vare's

nomination and the election and declares that, unless preserved for the use of the Senate, evidence relating to the election will be lost or destroyed. The Resolution empowers the special committee "to take . . and preserve all ballot boxes, . . ballots, return sheets, . . and other records, books and documents used in said senatorial election. . . ." It confers on the committee "all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195 . . with respect to the subject matter of that resolution." And it requires the Sergeant at Arms of the Senate to attend and execute the directions of the committee.

The Chairman of the Committee on Audit and Control of Contingent Expenditures having refused to approve the special committee's vouchers for expenses after the expiration of that Congress, the Sergeant at Arms refused to execute its orders. Thereupon the special committee directed the petitioner South, as its representative, to take possession of the boxes, ballots and other things referred to in Resolution 324.

Respondents are the commissioners, the prothonotary and a justice of the peace of Delaware County, Pennsylvania. They are authorized custodians of boxes, ballots and other things used in connection with the election. These were demanded by South in behalf of the committee. Respondents declined to give them up, and this suit was brought to obtain possession of them.

Petitioners do not claim that any Act of Congress authorizes the committee or its members, collectively or separately, to sue. Of course, South's authority is no greater than that of the committee which he represents. The suit cannot be maintained unless the committee or its members were authorized to sue by Resolutions 195 and 324, even if it be assumed that the Senate alone may give that authority. The power is not specifically granted by either resolution. Petitioners rely on the general language in Resolution 195 which follows the express authorization of the committee to use its own process to require the production of evidence. The words are "and to do such other acts as may be necessary in the matter of said investigation". The resolutions are to be construed having regard to the power possessed and customarily exerted by the Senate. It is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may de-

termine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees. By means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to the matters committed to it by the Constitution. *McGrain* v. *Daugherty*, 273 U. S. 135, 160, 161, 167, 174. And Congress has passed laws calculated to facilitate such investigations. R. S. § 101-104. U. S. C. Tit. 2, §§ 191-194. Petitioners have not called attention to any action of the Senate, and we know of none, that supports the construction for which they contend. In the absence of some definite indication of that purpose, the Senate may not reasonably be held to have intended to depart from its established usage. Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose. The phrase "such other acts as may be necessary" may not be taken to include everything that under any circumstances might be covered by its words. The meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized. *Oates* v. *National Bank*, 100 U. S. 239, 244. *Barrett* v. *Van Pelt*, 268 U. S. 85, 90. *Baltimore & Ohio Railroad Co.* v. *United States*, — U. S. —. The context, the established practice of the Senate to rely on its own powers, and the attending circumstances oppose the construction for which petitioners contend and show that the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not "authorized by law to sue."

*Decree affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*